No. 16-369

Title:	County of Los Angeles, California, et al., Petitioners v. Angel Mendez, et al.
Docketed:	September 22, 2016
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-56686, 13-57072)
Decision Date:	March 2, 2016
Rehearing Denied:	June 23, 2016

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 16 2016	Petition for a writ of certiorari filed. (Response due October 24, 2016)
Oct 24 2016	Brief of respondents Angel Mendez, et al. in opposition filed.
Nov 3 2016	Reply of petitioners Los Angeles County, California, et al. filed. (Distributed)
Nov 7 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 28 2016	DISTRIBUTED for Conference of December 2, 2016.
Dec 2 2016	Petition GRANTED limited to Questions 1 and 3 presented by the petition.
Jan 13 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioners.
Jan 17 2017	Joint appendix filed. (Statement of costs filed.)
Jan 17 2017	Brief of petitioners Los Angeles County, California, et al. filed.
Jan 23 2017	Brief amicus curiae of Los Angeles County Police Chiefs' Association filed.
Jan 24 2017	Brief amici curiae of National Association of Counties, et al. filed.
Jan 24 2017	Brief amicus curiae of United States filed.
Jan 24 2017	Brief amicus curiae of Major County Sheriffs' Association filed.
Jan 24 2017	Brief amici curiae of California State Sheriffs' Association, et al. filed.
Jan 25 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 3 2017	SET FOR ARGUMENT on Wednesday, March 22, 2017
Feb 3 2017	Record requested from the U.S.C.A. 9th Circuit.
Feb 6 2017	Record received from the U.S.C.A. 9th Circuit. The record is electronic and available on PACER.
Feb 16 2017	Brief of respondents Angel Mendez, and Jennifer Lynn Garcia filed.
Feb 22 2017	CIRCULATED.
Feb 22 2017	Brief amicus curiae of The Georgetown University Law Center Chapter of the Black Law Students Association filed. (Distributed)
Feb 23 2017	Brief amicus curiae of The Rutherford Institute filed. (Distributed)
Feb 23 2017	Brief amici curiae of National Association for the Advancement of Colored People, et al. filed. (Distributed)
Feb 23 2017	Brief amicus curiae of National Police Accountability Project filed. (Distributed)
Feb 23 2017	Brief amici curiae The American Civil Liberties Union and the ACLU of Southern California filed. (Distributed)

Mar 6 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 10 2017	Reply of petitioners County of Los Angeles, California, et al. filed. (Distributed)
Mar 22 2017	Argued. For petitioners: E. Joshua Rosenkranz, New York, N. Y.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Leonard Feldman, Seattle, Wash.
May 30 2017	Judgment VACATED and case REMANDED. Alito, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of this case.
Jul 3 2017	JUDGMENT ISSUED.

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RECORD
AND
BRIEFS

16-369

No. 16-____

Supreme Court, U.S.
FILED
SEP 16 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

COUNTY OF LOS ANGELES,
DEPUTY CHRISTOPHER CONLEY
and DEPUTY JENNIFER PEDERSON,

Petitioners,

—v—

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a 42 U.S.C. § 1983 action, the district court concluded Los Angeles County Sheriff's Department ("LASD") deputies *did not use excessive force* in shooting the plaintiffs in violation of their Fourth Amendment rights, based upon the factors set forth by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), as the deputies reasonably feared for their safety at the time of the shooting. However, the deputies were nevertheless found liable under the "provocation" rule created by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). This Court has not yet agreed or disagreed with the Ninth Circuit's "provocation" rule, but has noted the doctrine has been "sharply questioned" by other Courts of Appeals. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 n.4 (2015). The questions presented are:

1. Whether the Ninth Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other Courts of Appeals?

2. Whether, if the "provocation" rule is upheld, the qualified immunity analysis must be tailored to require a reviewing court to determine whether *every* reasonable officer in the position of the defendant would have known his unlawful conduct would *provoke a violent confrontation* under the specific facts of the case, as this is the conduct for which the Ninth Circuit

imposes constitutional liability despite a *reasonable* use of force under the Fourth Amendment?

3. Whether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Petitioners

- Deputy Jennifer Pederson, Defendant, Appellant and Cross-Appellee below
- Deputy Christopher Conley, Defendant, Appellant and Cross-Appellee below
- County of Los Angeles, Defendant, Appellant and Cross-Appellee below

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Respondents

- Angel Mendez, Plaintiff, Appellee and Cross-Appellant below
- Jennifer Lynn Garcia (Mendez), Plaintiff, Appellee and Cross-Appellant below

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There are no corporations involved in this proceeding.

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OPINIONS BELOW

The March 2, 2016 opinion and judgment of the Ninth Circuit is reported at *Mendez v. County of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016), and reproduced in the Appendix at pages 1a-26a. The district court's November 20, 2013 order denying the motion to amend the judgment or make additional findings was unreported, and is reproduced in the Appendix at pages 27a-51a. The August 27, 2016 district court judgment was not reported, and is reproduced in the Appendix at pages 52a-54a. The district court's Findings of Fact and Conclusions of Law was electronically reported at *Mendez v. County of Los Angeles*, 2013 U.S. Dist. LEXIS 11509 (C.D. Cal. 2013), and is reproduced in the Appendix at pages 55a-136a.

BASIS FOR JURISDICTION IN THIS COURT

On March 2, 2016, the Ninth Circuit issued its opinion in this matter. (App.1a.) After receiving an extension, on April 16, 2016, Petitioners timely filed a petition for rehearing and rehearing *en banc*. (App.141a-142a.) On April 22, 2016, the Ninth Circuit issued an order directing Respondents to file an answer to the petition for rehearing. (App.139a-140a.) On June 23, 2016, the Ninth Circuit denied Petitioners' petition for rehearing and rehearing *en banc*. (App.137a-138a.) Pursuant to 28 U.S.C. § 1254(1), jurisdiction is conferred upon this Court to review on

writ of certiorari the March 2, 2016 opinion of the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Respondents allege Petitioners violated their rights under the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

STATEMENT OF THE CASE

A. District Court Opinion

During a search for a felony parolee-at-large, Petitioners LASD Deputies Christopher Conley and Jennifer Pederson ("Defendants") shot Respondents Angel Mendez and Jennifer Lynn Garcia ("Plaintiffs"). (Appendix ("App.") 69a.) The Plaintiffs were shot while inside a shed in which they were living, located within the backyard of a residential home. (App.59a-60a, 67a-69a.) Plaintiffs sought to recover damages under 42 U.S.C. § 1983 for a violation of their constitutional rights.[1] (App.72a-135a.) Plaintiffs alleged Defendants violated their Fourth Amendment rights based upon

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[1] The Plaintiffs also alleged Defendants violated various state law torts, and the district court ruled in favor of Defendants on those claims. (App.130a-135.)

separate theories of liability for excessive force, warrantless entry, and an unlawful entry caused by the officers' failure to "knock and announce" their presence. (App.72a-135a.) A bench trial took place, and the district court made Findings of Fact and Conclusions of Law. (App.55a-136a.)

The district court found that on October 1, 2010, LASD officers from the Target Oriented Policing ("TOP") Team were searching for a parolee-at-large named Ronnie O'Dell, a wanted felony suspect who was categorized as "armed-and-dangerous" by the TOP Team. (App.56a-57a.) There was a warrant out for Mr. O'Dell's arrest. (App.57a.) Mr. O'Dell had evaded prior attempts to apprehend him. (App.57a.)

Following an officer sighting of Mr. O'Dell at a nearby grocery store, another officer, who is not a party to this action, received a confidential tip that a man believed to be Mr. O'Dell was riding a bicycle nearby in front of a private residence owned by woman named Paula Hughes. (App.57a-58a.) There was nothing about the confidential informant's tip which was specific to the Hughes residence as opposed to the rear of the property.[2] (App.93a.) Defendants were assigned to the Community Oriented Policing Unit, but were directed to supplement and assist the TOP Team on the day of the incident. (App.57a-58a.) Prior to officers presenting to the home of Ms. Hughes, the officer who received the confidential tip made an announcement to the group of responding officers that

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[2] The district court found "the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack." (App.93a.)

a man lived in the backyard of the Hughes residence with a pregnant lady. (App.59a.)

Ms. Hughes and Mr. Mendez were high school friends, and Ms. Hughes allowed Mr. Mendez to build a shack on her property in the area behind her home. (App.60a.) Mr. Mendez constructed a windowless shack, which was about seven feet wide, seven feet long and seven feet tall, out of wood and plywood. (App.61.) The shack had a single doorway entrance that faced the Hughes residence, which was about 6 feet tall and 3 feet wide. (App.61a.) Mr. Mendez and Ms. Garcia resided in the shed. (App.60a.)

Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats and pests. (App.62a.) The BB gun rifle closely resembled a small caliber rifle. (App.62a.)

Officers responded to the Hughes residence in search of the felony parolee-at-large. (App.58a-59a.) The officers did not have a search warrant to search the property. (App.63a, 66a.) As other officers approached the front door of the main residence, Defendants were assigned to clear the rear of the property for the officers' safety, should Mr. O'Dell be hiding thereabouts, and to cover the back door of the residence for containment, should Mr. O'Dell try to escape the rear of the Hughes property. (App.58a-59a.)

There was debris throughout the rear of the property, including abandoned automobiles located in the northwest corner. (App.60a.) While clearing the backyard, the Defendants checked three storage sheds between the main residence and a concrete wall bordering the property to the south. (App.65a.) The Defendants "had their guns drawn because they

were searching for Mr. O'Dell, whom they believed to be armed and dangerous." (App.65a.)

While continuing to clear the backyard, the officers came upon the shack at issue, and Deputy Conley opened the door to the shack and pulled back a blue blanket hanging from the top of the door frame, at which time he saw the silhouette of an adult male (Mr. Mendez) holding what appeared to be a rifle. (App.66a-67a.) Mr. Mendez was holding the gun when shot by the deputies because, when he perceived the wooden door being opened, he thought it was Ms. Hughes playing a joke, and he was in the process of moving the rifle so he could put his feet on the floor and sit-up. (App.68a.)

The district court found the barrel of the BB gun rifle would necessarily have been pointed toward Deputy Conley. (App.69a.) The district court found the deputies reasonably believed the BB gun was a firearm rifle, and "*reasonably* believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives." (App.69a.) Deputy Conley yelled "Gun!" and both Defendants fired their guns in the direction of Mr. Mendez, fearing they would be shot and killed. (App.69a.) Gunshots injured both Plaintiffs, who suffered severe injuries. (App.70a.)

The district court found in favor of Plaintiffs on their 42 U.S.C. § 1983 cause of action. (App.135a.) Notably, after analyzing the factors set forth by this Court in *Graham, the trial court concluded the Plaintiffs did not prove a violation of their Fourth Amendment rights based upon excessive force.* (App. 106a-108a, 135a.) "Deputies Conley and Pederson's use of force was reasonable given their belief that a man

was holding a firearm rifle threatening their lives." (App.108a.)

Nevertheless, the district court determined the Defendants were liable under the Ninth Circuit's "provocation" rule. Under the "provocation" rule, an officer may be held responsible for an otherwise reasonable use of force where the officer intentionally or recklessly provoked a violent confrontation, and the provocation was itself an independent Fourth Amendment violation. (App.109a (citing *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002).) "[A]n officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." (App.111a.) The district court found the "provocation" rule applied based upon the predicate constitutional violations of Plaintiffs' Fourth Amendment rights for a warrantless search of their shed, and the failure of the Defendants to "knock and announce" their presence. (App.109a-122a.) The damages award of approximately four million dollars to Plaintiffs was based upon Defendants' liability under the "provocation" rule.[3] (App. 135a-136a.)

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[3] If the "provocation" rule had not been invoked, the Plaintiffs' recovery would have been limited to only nominal damages. (App.52a-53a, 135a.) Specifically, the district court found the Fourth Amendment violations based upon the warrantless entry by Deputy Conley, and the failure to comply with the "knock and announce" requirement by both Defendants, caused only two dollars in nominal damages to the Plaintiffs. (App.135a.)

B. Ninth Circuit Published Opinion

First, the Ninth Circuit affirmed the district court's judgment based upon the "provocation" rule. (App.22a.) The Court noted that although the district court found the deputies' shooting of the Plaintiffs was not excessive under *Graham v. Connor,* 490 U.S. 386, the deputies were nevertheless found responsible under the "provocation" doctrine. (App.22a.) The Ninth Circuit's "provocation" rule may only apply where an officer's use of force was preceded by a constitutional violation by the Defendant, who intentionally or recklessly provoked a violent response. (App.22a.)

The Ninth Circuit reversed the district court's finding of a constitutional violation based upon the failure to comply with the "knock and announce" requirement, holding the deputies were entitled to qualified immunity, as the law was not clearly established at the time of the incident that the rule would apply under the circumstances of this case. (App.20a.) However, the Court of Appeals affirmed the district court's finding of a constitutional violation based upon a warrantless entry in violation of the Fourth Amendment. (App.18a.)

Notably, the Ninth Circuit recognized the "provocation" rule required the Defendants to have intentionally or recklessly *provoked a violent confrontation* with the Plaintiffs, and that the provocation was an independent constitutional violation. (App.22a.) "'[W]here an officer intentionally or recklessly *provokes a violent confrontation,* if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly

force.' *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (citing *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)." (App.22a.) Notwithstanding, the Ninth Circuit rejected Defendants' argument that the "provocation" rule could not apply because the Defendants' conduct did not provoke a violent reaction. (App.5a-6a, 22a.) In denying qualified immunity, the Ninth Circuit focused upon the conduct and viewpoint of the *Plaintiffs*, rather than upon the conduct and viewpoint of the *Defendants*, reasoning the Plaintiffs should not be in a worse position simply because the officers' conduct did not provoke a violent response by them. (App.23a.) However, qualified immunity must be analyzed from the viewpoint of the Defendants. The Court of Appeals did not determine whether a reasonable officer in the position of the Defendants *could* have failed to realize their conduct would provoke a violent response.

Moreover, the Ninth Circuit did not determine whether the Defendants "intentionally or recklessly" provoked a violent response, finding the constitutional violation of a warrantless entry in of itself satisfied the requirement. (App.23a-24a.) Thus, the Court of Appeals conflated the necessary showing that an officer acted intentionally or recklessly to provoke a violent response, with proving the predicate, constitutional violation.

Second, the Ninth Circuit stated that even without relying upon the Ninth Circuit's "provocation" doctrine, "the deputies are liable for the shooting under basic notions of proximate cause," based upon the foreseeability or the scope of the risk created by the predicate conduct. (App.24a.) "The deputies are

therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." (App.25a.)

The Court of Appeals found "the situation in this case, where Mendez was holding a gun when the *officers barged into the shack unannounced,* was reasonably foreseeable." (App.25a (emphasis added).) "Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." (App.21a-22a.) The Ninth Circuit made the foregoing findings despite the fact that it found the officers were entitled to qualified immunity from Plaintiffs' claim that Defendants failed to "knock and announce" their presence. (App.20a.)

REASONS TO GRANT THE PETITION

The Ninth Circuit's "provocation" rule allows a plaintiff to hold a police officer civilly responsible in a 42 U.S.C. § 1983 action for a use of force which has been found *reasonable* under the Fourth Amendment by the trier of fact based upon the totality of the circumstances and the factors set forth by this Court in *Graham v. Connor,* 490 U.S. 386 (1989). This Court has never approved the "provocation" rule. Courts of Appeals should not be permitted to circumvent this Court's precedent regarding the appropriate manner

in which to measure a claim of excessive force/ unreasonable seizure. An officer cannot be liable for damages stemming from a use of force that was reasonable under the Fourth Amendment.

1. Review is necessary because the Ninth Circuit's continued application of the "provocation" rule to find civil liability against a police officer in a 42 U.S.C. § 1983 action based upon excessive force, is a substantial question of federal law which should be, but has not yet been, settled by this Court. Under the doctrine, despite the fact that the court (judge or jury) has determined an officer's use of force was objectively reasonable and did not violate the Fourth Amendment, a police officer is nevertheless liable for a plaintiff's resulting damages if the officer intentionally or recklessly "provoked a violent response" from the plaintiff, necessitating the use of force.

Following trial, the district court specifically found the officers did not use excessive force based upon the totality of the circumstances and the factors set forth in *Graham* when they shot the Plaintiffs, given that they reasonably believed Mr. Mendez aimed a gun at them and reasonably feared for their lives. (App.69a, 108a.) However, the district court concluded, and the Ninth Circuit affirmed, that, despite the *reasonable* use of force under the factors set forth in *Graham,* the deputies were liable for the shooting under the Ninth Circuit's "provocation" rule. In *City & County of San Francisco v. Sheehan,* 135 S.Ct. 1765 (2015), this Court specifically noted that it had not yet ruled upon whether it agreed or disagreed with the Ninth Circuit's "provocation" rule. *Id.* at 1777 n.4. Defendants respectfully submit this is the optimal

case for the Supreme Court to rule on the propriety of the "provocation" rule.

Furthermore, the Ninth Circuit's "provocation" rule has been rejected by a number of other circuits, resulting in inconsistency in the application of federal law with respect to the imposition of liability against a police officer for violating a plaintiff's constitutional right to be free from excessive force. In *Sheehan*, this Court recognized other circuit courts disagreed with the "provocation" rule, stating:

> Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. *The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere. See Livermore v. Lubelan*, 476 F. 3d 397, 406-407 (CA6 2007); *see also, e.g., Hector v. Watt*, 235 F. 3d 154, 160 (CA3 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause").

Sheehan, 135 S.Ct. at 1777 n.4 (emphasis added). Accordingly, as recognized by this Court, the "provocation" doctrine conflicts with decisions by other Courts of Appeals. *Id.*

In addition to the Sixth and Third Circuit cases referenced in the foregoing passage, the Ninth Circuit's decision and application of the "provocation" rule further conflicts with decisions by the Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, which find force must be measured at the time it is applied and not based upon pre-seizure conduct, and the rule

threatens the consistency of federal law. *See Terebesi v. Torreso*, 764 F.3d 217, 235 n.16 (2d Cir. 2014); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991); *Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 2433 (2012); *Fraire v. Arlington*, 957 F.2d 1268 (5th Cir. 1992), *cert. denied* 506 U.S. 973 (1992); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994); *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995); and *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994). Notably, Defendants are aware of no other circuit which holds an officer responsible for a *reasonable* use of force.

2. If the "provocation" doctrine is upheld, review is further necessary to decide whether an officer's entitlement to qualified immunity should include a determination by the reviewing court that *every* reasonable officer in the position of the defendant would have known his unlawful conduct *would provoke a violent confrontation* with the plaintiff under the specific facts of the case, as this is conduct for which the Ninth Circuit imposes liability despite a *reasonable* use of force under the Fourth Amendment. This Court should resolve the important federal question of how qualified immunity should be analyzed in a case where a plaintiff seeks to hold a police officer liable under the "provocation" rule.

In its decision, the Ninth Circuit affirmed the denial of qualified immunity based solely on its finding that the officers were not entitled to qualified immunity for the predicate constitutional violation of

a warrantless entry into the Plaintiffs' shed. Defendants respectfully submit the Ninth Circuit's analysis was incomplete. Although a defendant must have violated a plaintiff's constitutional rights prior to a use of force for the rule to apply, *not every predicate constitutional violation is likely to "provoke a violent response."* Accordingly, in analyzing qualified immunity, assuming a reasonable officer in the position of the defendant would have known his conduct was unlawful in relation to the predicate constitutional violation, a reviewing court must also determine whether a reasonable officer in the position of the defendant *could have failed to realize his conduct would provoke a violent confrontation.*

Furthermore, the law was not clearly established that an officer could be liable under the "provocation" rule when, as here, it is undisputed the Defendants' conduct did not actually provoke a violent response. In fact, in *Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) and *Billington v. Smith*, 292 F.3d 1177, 1189, 1191 (9th Cir. 2002), the Ninth Circuit stated the "provocation" rule does not apply where the evidence does not show the officer's actions should have provoked an armed response. Thus, the Ninth Circuit's decision also directly conflicts with its own prior case law, by imposing liability against the officers despite the lack of a finding by the district court that the Defendants' conduct provoked a violent response or escalated a confrontation with the Plaintiffs.

Moreover, in *Sheehan*, this Court stated "*even if* a controlling circuit precedent" could constitute clearly established federal law, the law was not clearly estab-

lished. *Sheehan,* 35 S.Ct. at 1776 (emphasis added). This Court has not approved of the "provocation" rule, much less established the parameters of the doctrine and the circumstances under which qualified immunity may be denied. In this regard, the Defendants should have been afforded qualified immunity from liability under the "provocation" rule.

3. Review is further warranted to determine whether an incident giving rise to a *reasonable* use of force is an intervening, superseding event, which breaks the chain of causation from an earlier unlawful entry, in an action brought under 42 U.S.C. § 1983. Although the district court only awarded nominal damages on Plaintiffs' warrantless entry claim, the Ninth Circuit found the officers could be liable for the damages caused by the use of force, based upon the entry without a search warrant. Whether damages stemming from a reasonable use of force were proximately caused by a prior, unlawful entry under the Fourth Amendment is a substantial question of federal law for the Supreme Court to answer.

Furthermore, the Ninth Circuit's opinion directly conflicts with decisions by other Courts of Appeals regarding the proper manner in which to determine causation in a 42 U.S.C. § 1983 action. The Third, Fourth, Sixth and Tenth Circuits have held that under general principles of tort and causation, officers who unlawfully enter a home are not liable for harm caused by a reasonable use of force, which is a superseding cause of the harm. *Kane v. Lewis*, 604 Fed.Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015); *James v. Chavez*, 511 Fed.Appx. 742, 747-48 (10th Cir. 2013); *Lamont v. New Jersey*, 637 F.3d 177,

186 (3d. Cir. 2011); *Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 40-42 (6th Cir. 2005); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000); and *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995). Review should be granted to establish consistency regarding the proper manner to determine causation in 42 U.S.C. § 1983 action, where a plaintiff is injured from a reasonable use of force, which took place following an earlier, unconstitutional entry.

I. THE NINTH CIRCUIT'S "PROVOCATION" RULE IMPROPERLY MEASURES THE REASONABLENESS OF FORCE UNDER THE FOURTH AMENDMENT, CONFLICTS WITH SUPREME COURT PRECEDENT, AND IS HEAVILY CRITICIZED BY THE OTHER CIRCUITS.

Defendants respectfully submit the Ninth Circuit's "provocation" rule should be overturned. The rule conflicts with Supreme Court precedent regarding the proper manner in which to determine the reasonableness of force in a 42 U.S.C. § 1983 action, and has been rejected by other circuit courts.

A. The Ninth Circuit's "Provocation" Rule Contravenes *Graham v. Connor* by Holding an Officer Civilly Responsible for a *Reasonable* Use of Force.

Of course, *Graham v. Connor*, 490 U.S. 386 (1989) sets the standard to determine reasonableness in an excessive force/unreasonable seizure claim based upon an alleged violation of a plaintiff's Fourth Amendment rights in an action brought under 42 U.S.C. § 1983. In *Graham*, this Court held reasonableness is measured at the *moment* force is applied, and embodies an

allowance for the fact that officers must make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, 490 U.S. at 396-97. This Court set forth a non-exhaustive list of factors for evaluating the reasonableness of a seizure based upon the totality of the circumstances, including: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape. *Id.* at 396. Nevertheless, courts have found the "most important" factor under *Graham* is whether the suspect posed an immediate threat to the safety of the officers. *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013) (citations omitted); *Coles v. Eagle*, 704 F.3d 624, 629 (9th Cir. 2012).

The Ninth Circuit has employed a practice which conflicts with *Graham* by subjecting a police officer to 42 U.S.C. § 1983 liability for a use of force, even though the force used by the officer was reasonable and justified at the moment at which it occurred. Under the Ninth Circuit's "provocation" rule, a plaintiff may recover damages if he can show the officer's reasonable use of force was made necessary by the plaintiff's violent response to the officer's conduct, if the officer intentionally or recklessly provoked the response, and the provocation itself was an independent constitutional violation. *Billington v. Smith*, 292 F.3d 1177, 1189, 1191 (9th Cir. 2002). Defendants respectfully submit that if a use of force is deemed reasonable under the *Graham* factors, including the immediacy of the threat posed to the officer at the time of the incident, an officer should not be liable for damages resulting

from the use of force, irrespective of an earlier constitutional violation.

B. The Ninth Circuit's "Provocation" Rule Has Been Rejected by, and Conflicts with, Decisions from Other Courts of Appeals.

As noted by this Court, other circuits have sharply questioned the "provocation" rule created by the Ninth Circuit. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 n.4. A number of circuits reject the contention that circumstances leading up to a fatal shooting, including an unlawful entry by police officers, should be considered in evaluating the reasonableness of an officer's use of deadly force in a 42 U.S.C. § 1983 action, as the excessive force inquiry is confined to whether the officer was in danger *at the moment* of the threat that resulted in the officer's use of force.

In *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000), the Third Circuit cited to its decision in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), and stated:

> In *Bodine*, for example, the plaintiff alleged that police officers illegally entered his house and used excessive force as they tried to arrest him. We held that the illegal entry did not make the officers automatically liable for any injuries caused by the arrest. Invoking proximate causation, we explained that if the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officers' liability. For the plaintiff to recover all the damages he sought, we said

> that he had to prove two torts—one for the illegal entry and a second for excessive force.

Hector, 235 F.3d at 160. In *Bodine*, the Court posed the following hypothetical, to show why an unlawful entry should not automatically mean the officers are liable for a subsequent use of force:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."

Bodine, 72 F.3d at 400.

In *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007), the Sixth Circuit rejected the plaintiff's reliance on the Ninth Circuit's decision in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), stating:

> Although this circuit has not addressed *Billington* directly, we have rejected such an analysis. The proper approach under Sixth Circuit precedent is to view excessive force

> claims in segments. [Citation.] That is, the court should first identify the "seizure" at issue here and then examine "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances."

Livermore, 476 F.3d at 406 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996)); *see also Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001) (the Sixth Circuit's "segmenting" analysis requires the use of deadly force to be determined separately from prior actions taken by the officers).

Also, in *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996), the Second Circuit rejected the plaintiff's claims that the officer was liable for using excessive force because he created a situation in which the use of deadly force became necessary. *Id.* at 92. Rather, a defendant's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the *moment* he decided to employ deadly force. *Id.*

Moreover, in *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 2433 (2012), the Fifth Circuit stated the plaintiff's argument that the officer's use of force was unreasonable because a forced entry led to the fatal shooting was unavailing; rather, the force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's use of deadly force. *Id.* at 992-93; *see also Fraire v. Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992), *cert. denied* 506 U.S. 973 (1992).

Furthermore, the Seventh Circuit has indicated every force incident is carved into segments and judged

on its own terms to *see* if the officer acted reasonably at each stage. *See Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994); *see also Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (the Fourth Amendment prevents unreasonable seizures, not pre-seizure conduct, regardless of whether it is unreasonable or unjustified).

In *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit also agreed with the Seventh Circuit's holding that explicit time frame requirements are used to determine reasonableness, which is consistent with the Supreme Court's focus in *Graham* that reasonableness is measured at the very moment when an officer makes the "split-second" judgment. *Id.* at 792. Claims based upon the officer's actions leading up to the time immediately prior to the shooting are irrelevant. *Id.*; *see also Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005 ("the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis"); *Drewitt v. Pratt*, 999 F.2d 774, 779-80 (4th Cir. 1993).

Likewise, the Eighth Circuit only scrutinizes the seizure itself, and not the events leading up to the seizure. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). In *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995), the Eighth Circuit rejected the plaintiff's argument that the officers' conduct prior to the seizure caused the circumstances which ultimately led to the need to use deadly force, as such an analysis violated *Graham*. *Id.* at 648.

In *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994), the Eleventh Circuit relied upon the Seventh Circuit's decision in *Plakas* and stated the time-

frame is a crucial aspect of excessive force cases. *Menuel,* 25 F.3d at 997 (citations omitted).

Conversely, in *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001), the Tenth Circuit indicated a reviewing court may consider whether the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use such force, but *the primary focus of the inquiry remains on whether the officer was in danger at the exact moment of the threat of force. Id.* (citations omitted). In *Young v. City of Providence*, 404 F.3d 4 (1st Cir. 2005), the Court of Appeals stated the rule in the First Circuit was that once it is clear that a seizure has occurred, "the court should examine the actions of the government officials leading up to the seizure"; thus, an officer's actions need not be examined solely at the moment of the shooting. *Id.* at 22. The Court of Appeals noted the various circuits have taken conflicting positions on the manner in which conduct leading up to a challenged shooting should be weighed in an excessive force case, with the Fourth Circuit finding pre-shooting conduct is generally not relevant and is inadmissible. *Id.* at 22 n.12.

As demonstrated, the Courts of Appeals are in conflict regarding the proper manner in which to measure excessive force claims. The majority of circuits do not consider pre-seizure conduct in analyzing the totality of the circumstances regarding the reasonableness of force used by a police officer, as force must be measured at the moment it occurs. While the Tenth and First Circuits allow pre-seizure conduct to be considered as *one of the factors* in analyzing the reasonableness of force under the totality of the

circumstances, Defendants are aware of no other circuit court which holds an officer civilly responsible for damages caused by a use of force the trier of fact has found to be *reasonable* under the Fourth Amendment, based upon the totality of the circumstances.

C. The "Provocation" Rule Puts the Lives of Officers at Risk.

The "provocation" rule puts officers' lives at risk by holding them civilly responsible for a *reasonable* use of force. In this regard, the rule encourages officers to refrain from self-defense at the threat of violence, or else be subject to liability in a courtroom. The doctrine forces police officers to be constitutional scholars, analyzing whether his or her prior conduct violated a constitutional right of a person *threatening the officer with violence*, during the split-second moment during which the officer must make a decision regarding whether to defend himself or herself from harm.

II. AN OFFICER SHOULD BE ENTITLED TO QUALIFIED IMMUNITY FROM THE "PROVOCATION" RULE UNLESS *EVERY* REASONABLE OFFICER WOULD HAVE KNOWN HIS UNCONSTITUTIONAL CONDUCT WOULD *PROVOKE A VIOLENT CONFRONTATION UNDER THE SPECIFIC FACTS OF THE CASE.*

The law is well-established that an officer is entitled to qualified immunity in a 42 U.S.C. § 1983 action where: (1) the facts do not show a violation of a constitutional right; or (2) the constitutional right was not "clearly established" by law at the time of the incident, such that "it would be clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Indeed, qualified immunity may only be denied where *every* reasonable officer would have acted differently. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012); *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (a law enforcement officer is entitled to qualified immunity if a reasonable officer in his position *could* have believed that his conduct was lawful). Whether a right is clearly established is not determined as a broad proposition of law, but is based upon the specific context of the particularized case and the circumstances facing the defendant. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Under the Ninth Circuit's "provocation" rule, there are *two* components that must be satisfied before the doctrine may apply: (1) *an officer intentionally or recklessly provokes a violent confrontation*, and (2) the provocation is an independent Fourth Amendment violation. *George v. Morris*, 736 F.3d 829, 837 n.14 (9th Cir. 2013); *Billington v. Smith*, 292 F.3d 1177, 1190-90 (9th Cir. 2002); *Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) (the defendant's conduct must have caused an *escalation* which led to the use of force).

The "provocation" rule was originally developed in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In that case, the Ninth Circuit held liability for excessive force could be based upon the manner in which a SWAT team stormed and forcibly entered the home of a mentally unstable, elderly gentleman, including using a battering ram to

break down his door, which led to a violent confrontation inside the home. *Id.* at 3158, 1366. Liability was premised upon "using unreasonable force to enter the house." *Billington*, 292 F.3d at 1188 (citations omitted). Subsequently, in *Duran*, the Court stated that for *Alexander* to apply, the officer's actions in approaching the plaintiff or decedent must be "excessive and unreasonable," and that such conduct by the defendant must have "*caused an escalation that led to the shooting.*" *Duran*, 221 F.3d at 1131 (emphasis added). The evidence must show the officer's actions "should have *provoked* an armed response." *Billington*, 292 F.3d at 1189 (citations omitted).

Subsequently, in *Billington*, 292 F.3d 1188, the Ninth Circuit stated: "We read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington*, 292 F.3d at 1189. The Ninth Circuit has never eliminated the requirement that the defendant's conduct must have *provoked a violent response*, for the "provocation" rule to apply. Thus, in analyzing qualified immunity, assuming a reasonable officer in the position of the defendant would have known his conduct was unlawful in relation to the predicate constitutional violation, a reviewing court must *also* determine whether a reasonable officer in the position of the defendant *could have failed to realize his conduct would provoke a violent response*, as this is the conduct for which the Ninth Circuit imposes constitutional liability despite a *reasonable* use of force under the Fourth Amendment.

In other words, not every predicate constitutional violation by a police officer should reasonably be expected to lead to a violent confrontation. For example, similar to the scenario noted in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), consider a situation where an officer fails to comply with the "knock and announce" requirement and improperly steps into the entryway of a home. The officer calmly shows his badge to the occupants and states, in a non-threatening manner, that he was there for some lawful purpose. If an occupant within the home retrieved a gun and began shooting at the officer, the officer would be entitled to shoot back, despite his unconstitutional entry into the home. As another example, an officer unlawfully conducting a warrantless search for contraband of an unoccupied outbuilding within the curtilage of a home may have committed a constitutional violation, but would not reasonably expect his conduct to provoke a violent confrontation, necessitating the need for force. Under the foregoing examples, the officer should be entitled to qualified immunity from any attempt to impose liability under the "provocation" rule.

In this case, the Ninth Circuit erroneously denied qualified immunity to the Defendants from plaintiffs' claim under the "provocation" doctrine. The Court of Appeals analyzed only whether the Defendants were entitled to qualified immunity for the predicate constitutional violation of the warrantless entry of the shed. "[O]ur determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights." (App.24-25.) The Court of Appeals did not sepa-

rately also consider whether every reasonable officer in the position of the Defendants would have believed their conduct was likely *to provoke a violent response.* Thus, Defendants respectfully submit the qualified immunity analysis was incomplete.

Indeed, it is undisputed the Defendants' conduct did not, in fact, "provoke a violent response" by the Plaintiffs. The Ninth Circuit found liability anyway, as it believed the Plaintiffs should not be in a worse position simply because the officers' conduct did not provoke a violent response by them. (App.22a-23a.) However, qualified immunity must be determined from the *officers' viewpoint*, not the Plaintiffs. From the Defendants' viewpoint, *they had no interaction with the Plaintiffs prior to the use of force*, such that they would know their conduct was *escalating* any volatile situation. Rather, the officers opened the door to the shack, located within the backyard of the main residence, while searching for a felony parolee-at-large, and had not even entered the threshold of the shed, before reasonable force had to be used. A reasonable officer in Defendants' position *could* have believed their conduct prior to the seizure was not likely to lead to a violent confrontation with the Plaintiffs.

The Ninth Circuit found that whether a reasonable officer in the position of the Defendants could have failed to recognize the shed was an inhabited dwelling was irrelevant, because the shed was within the curtilage of the main home owned by Ms. Hughes. (App.9a.) However, a reasonable officer would not expect to find residents living in a dilapidated shed, which appeared uninhabitable, within the curtilage of a main home. The issue is

relevant to determining whether a reasonable officer could have failed to recognize that opening the shed door without a warrant would lead to a violent confrontation with residents inside the shed, for the purpose of determining entitlement to qualified immunity.[4]

Nevertheless, assuming *every* reasonable officer would have known the shed was the Plaintiffs' home, not every warrantless entry is likely to provoke a violent confrontation, depending upon the specific context of the case and the circumstances facing the defendant. Here, the district court found Deputy Conley "searched" the shack when he opened the wooden door and pulled back the blue blanket that hung from the top of the doorframe. (App.88a.) Such conduct is not akin to the officers' excessive and unreasonable entry in *Alexander*. A reasonable officer in Deputy Conley's position *could* have failed to realize that opening the door and peering inside a shed, *without actual entry into the shed*, was likely to lead to a violent confrontation. *See Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011) (the officer's breach of the door, in of itself, did not cause the need for the force).

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[4] While the Ninth Circuit later stated the officers "should" have been aware the shack was being used as a residence (App.21a.), the Court of Appeals never addressed the crucial question of whether *one* reasonable officer *could* have believed no one was *currently living* in the shed at the time of the incident, based upon its dilapidated appearance, for the purposes of determining qualified immunity. (See photographs at Excerpts of Record 204-05.)

In other words, not *every* reasonable officer in the position of the Defendants would believe that opening the door to a home without a search warrant would cause the residents therein to immediately point a rifle at the officers, without any escalation of a conflict or any interaction between the officers and the occupants therein. For example, in *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016), *petition for cert. filed*, (U.S. July 11, 2016) (No. 16-67), the Tenth Circuit considered whether there was a triable issue of fact with respect to the reasonableness of force used by the officers against two brothers in their own home. Following a road rage incident between the brothers and other citizens, the officers approached the home in the dark with flashlights, while it was raining, and the incident ended with the officers shooting one of the brothers. *Id.* at 1065-67. The Tenth Circuit stated the requisite causal connection for 42 U.S.C. § 1983 liability is satisfied if the officers' conduct immediately preceding the shooting was the but-for cause of the decedent's death, *and if the decedent's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability. Id.* The officers argued it was *not foreseeable* that the brothers would try to shoot them with a gun, as such a response was wholly disproportionate and unexpected, and amounted to a superseding cause of the events. *Id.* The self-defense of the home allows lethal force by a homeowner when necessary to prevent the commission of a felony in his home. *Id.* The Tenth Circuit noted the interaction between the brothers and the officers, which showed an escalation of violence between them. *Id.* at 1066-67. The Court of Appeals concluded that because it was objectively reasonable *for the officers* to believe the

brothers might think they were intruders, a jury could find that it was foreseeable the brothers would arm themselves to defend their home. *Id.* Conversely, if the homeowners knew it was officers who were approaching, the homeowners would not be expected to raise arms at police in defense of their home. *See James v. Chavez*, 511 Fed.Appx. 742, 747-48 (10th Cir. 2013) (a homeowner may not use deadly force to defend his home from an unlawful entry by the police).

Here, unlike the situation in *Pauly*, the officers can bear no responsibility for failing to identify themselves before opening the door to the shed, as the Ninth Circuit found the Defendants are entitled to qualified immunity from the Plaintiffs' claim based upon the failure to comply with the "knock and announce" requirement. Thus, the issue is whether *one* reasonable officer *could* believe a homeowner would refrain from *shooting him* merely for opening a door a home without a warrant, given that homeowners are not authorized to use lethal force unless they believe an attacker is entering their home to commit a felony therein, and not if they simply believe a police officer is conducting a warrantless search. *See Pauly*, 814 F.3d at 1067.[5] Moreover, in contrast to *Pauly*, there was no interaction with the Plaintiffs prior to the need for force to be used by the Defendants,

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[5] *See also* Cal. Pen. C. § 197(2) (homicide is justifiable when committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein).

and the Defendants' conduct did not "escalate" the situation and did not provoke a violent confrontation with the Plaintiffs (indeed, Mr. Mendez believed it was his friend, Ms. Hughes, who was approaching). As noted, the officers had not even crossed the threshold of the shed prior to seeing the gun aimed at them. As not every reasonable officer would believe their conduct to be provocative of violence under these circumstances, the Defendants are entitled to qualified immunity.

Furthermore, certainly, the law is not *clearly established* that an officer could be liable under the "provocation" rule, if his conduct did not "provoke a violent response." Rather, in *Billington*, the Court of Appeals stated: "*In the case at bar, Hennessey's estate has not established that Detective Smith provoked Hennessey's attack*, much less committed an independent Fourth Amendment violation that provoked it." *Billington*, 292 F.3d at 1191 (emphasis added); *see also Duran*, 221 F.3d at 1131 (defendant's conduct must have caused an *escalation* which led to the use of force). Here, it is undisputed and the district court found Deputy Conley peered inside the shed the very moment Mr. Mendez was moving the BB gun rifle because he believed Ms. Hughes was at the door. (App.69a, 108a.) The Defendants would not have anticipated that the act of police officers simply opening the door to the shack would result in a resident therein aiming a gun at them and, in fact, as in *Billington*, it did not.

In this case, the Ninth Circuit relied upon *Espinosa v. City & County of San Francisco*, 598 F.3d 528 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 1089

(2012), and stated liability may attach even if the officer's conduct has not provoked a violent response. (App.23a.) However, *Espinosa* recites the *Billington* rule that the doctrine may apply where an officer acts intentionally or recklessly to provoke a violent confrontation with the plaintiff. *Espinosa*, 598 F.3d at 538. Moreover, in *Espinosa*, unlike here, the officers actually entered the residence, leading to a confrontation in the attic where the decedent failed to follow instructions, and triable issues of fact were found regarding his behavior which led to the use of force. *Id.* at 533. *Defendants are not aware of any case applying the "provocation" rule when the force was necessitated based purely upon an unfortunate coincidence*: here, Mr. Mendez's movement of the BB gun rifle at the exact moment the officers peered into the shed. Also, even if *Espinosa* could be interpreted as new law which no longer requires the Defendants' actions to have provoked a violent confrontation before the "provocation" rule can apply, it would conflict with *Billington* and *Duran*, and the law would not be "clearly established" for the purposes of determining qualified immunity in any event.

Moreover, this Court has not squarely ruled that controlling circuit precedent could set clearly established law. *See City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1766. This Court has not approved the "provocation" rule, which holds police officers civilly liable for a reasonable use of force if certain criteria are met. Additionally, as indicated above, the law is not clearly established regarding whether an officer's pre-shooting conduct should even be considered in analyzing a use of force, and the majority of circuits hold pre-shooting conduct is not relevant, as force is

measured based upon the circumstances facing the officer at the moment it was applied. Accordingly, Defendants should not be found responsible for damages resulting from a reasonable use of force following a warrantless entry, as not every reasonable officer would believe that the conduct of shooting a resident who was aiming a weapon at him was unconstitutional, even if the officer had entered the home without a search warrant. Thus, the Defendants are entitled to qualified immunity from the Plaintiffs' claims for damages resulting from the use of force, as a matter of law.

III. An Incident Giving Rise to a Reasonable Use of Force Is an Intervening, Superseding Event, Which Breaks the Chain of Causation from an Earlier Unlawful Entry in an Action Brought Under 42 U.S.C. § 1983.

The law is well-established that to prevail in an action brought under 42 U.S.C. § 1983, the plaintiff must prove the defendant's conduct was the proximate cause of the constitutional injury. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599-600 (1989); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) (a plaintiff in a 42 U.S.C. § 1983 action must prove but-for *and* proximate causation).

A. Causation in a 42 U.S.C. § 1983 Action Is a Substantial Issue of Federal Law Which Should Be Settled by This Court.

Whether conduct giving rise to a *reasonable* use of force breaks the chain of causation in a 42 U.S.C. § 1983 action in relation to an earlier, unlawful entry under the Fourth Amendment, is a substantial question

for this Court to answer. In its decision, the Ninth Circuit found that, aside from the provocation theory, the shooting damages may be upheld as proximately caused by the warrantless entry. (App.24a.) However, if the "provocation" doctrine did not apply, the circumstance requiring the officers to use deadly force, *i.e.*, observing what appeared to be a rifle pointed directly at them, was a superseding incident following the warrantless entry, breaking the chain of causation.

B. The Ninth Circuit's Decision Directly Conflicts with Decisions by Other Circuit Courts.

The Ninth Circuit's decision indicating the Defendants can be held liable for the shooting based upon proximate causation stemming from the predicate conduct of the earlier, unlawful entry, directly conflicts with decisions by the other circuit courts. *Kane v. Lewis*, 604 Fed.Appx. 229, 234-35 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 358 (2015) (officers who unlawfully enter a home are not liable for harm caused by the reasonable use of force, which is a superseding cause of the harm) (citations omitted); *James v. Chavez*, 511 Fed.Appx. 742, 750 (10th Cir. 2013) (even if actions of officer in unlawfully entering home were a but-for cause of the suspect's conduct of trying to shoot the officer, the suspect's conduct was a superseding cause of death); *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d. Cir. 2011) ("as long as 'the officer['s] use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be a [superseding] cause that limited the officer['s] liability.'"); *Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 40-42 (6th Cir. 2005) (irrespective of a

warrantless entry, damages could not be awarded against officers for shooting the decedent, where officers reasonably feared for their safety); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000) (if the officers' use of force was *reasonable* given the plaintiff's acts, then despite the illegal entry, causation cannot be established); and *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995) (damages stemming from an unlawful entry *do not* include damages resulting from a *reasonable* use of force based upon principles of proximate causation, as the event giving rise to the *reasonable* use of force is a "superseding cause").

Defendants respectfully submit that damages stemming from a warrantless search do not encompass damages stemming from a subsequent, *reasonable* seizure.

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 16, 2016

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OPINION OF THE NINTH CIRCUIT (MARCH 2, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees/
Cross-Appellants,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy;
JENNIFER PEDERSON,

Defendants-Appellants/
Cross-Appellees.

Nos. 13-56686, 13-57072

D.C. No. 2:11-cv-04771 MWF-PJW

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Before: Ronald M. GOULD and Marsha S. BERZON, Circuit Judges, and George Caram STEEH III,* Senior District Judge.

GOULD, Circuit Judge:

While participating in a warrantless raid of a house, Los Angeles County Sheriff's Department deputies Christopher Conley and Jennifer Pederson entered the backyard, opened the door to a wooden shack, and shot Angel and Jennifer Mendez, a homeless couple who resided in the shack. After a bench trial, the district court held that the deputies violated the Fourth Amendment knock-and-announce requirement and prohibition on warrantless searches, finding that no exigent circumstances applied. The district court denied the deputies' bid for qualified immunity and awarded the Mendezes damages.

The deputies argue on appeal that the district court erred by denying their qualified immunity defense. The Mendezes cross-appeal the district court's conclusion that the deputies had probable cause to believe that a wanted parolee was hiding in the shack when the deputies searched it. We affirm the district court's conclusion that the deputies were not entitled to qualified immunity for their warrantless entry, and we hold that the district court properly awarded damages for the shooting that followed. Given this disposition, the cross-appeal is dismissed as moot. We reverse, however, the district court's determination

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

that the deputies were not entitled to qualified immunity on the knock-and-announce claim, and we remand for the district court to vacate the nominal damages for that claim.

I

Because this case involves the deputies' renewed assertion of qualified immunity after judgment, we recite the following facts in the light most favorable to the nonmoving parties and the factfinder's verdict. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452-53 (9th Cir. 2013).

In October 2010, Deputies Christopher Conley and Jennifer Pederson were part of a team of twelve police officers that responded to a call from a fellow officer who believed he had spotted a wanted parolee named Ronnie O'Dell entering a grocery store. O'Dell had been classified as armed and dangerous by a local police team, although that classification was "standard" for all parolees-at-large without regard to individual circumstances. Before that day, "Conley and Pederson did not have any information regarding Mr. O'Dell." Conley testified that at the time of the search he knew nothing about O'Dell's "criminal past" and that he didn't recall being given information that O'Dell was armed and dangerous, and Pederson testified that the only information she was given about O'Dell was that he was a parolee-at-large.[1] The officers searched the grocery store for O'Dell but

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[1] Pederson also stated, in response to a leading question, that she was shown a "flyer of sorts" containing a picture of O'Dell and information about O'Dell's criminal history, but she did not testify what the flyer described.

did not find him. The officers then met behind the store to debrief.

During this debriefing, another deputy, Claudia Rissling, received a tip from a confidential informant that a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes. The officers "developed a plan" in which some officers would proceed to the Hughes house, but because "the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence," others would proceed to a different house on the same street. Conley and Pederson were "assigned to clear the rear of the Hughes property for the officers' safety . . . and cover the back door of the Hughes residence for containment." The officers were told that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)."[2] Pederson heard that announcement, but Conley testified that he did not recall it.[3]

Conley and Pederson arrived at the Hughes residence along with three other officers. The officers did not have a search warrant to enter Hughes's property. Conley and Pederson were directed "to proceed to the back of the Hughes residence through the south gate." Once in the backyard, the deputies encountered three storage sheds and opened each of them, finding nothing.

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[2] Mr. Mendez was a high school friend of Hughes, and Hughes allowed him to construct and live in a shack in her backyard. The Mendezes had been living there for about ten months.

[3] The district court found that "[e]ither he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made."

During this time, other officers (led by Sergeant Gregory Minster) banged on the security screen outside Hughes's front door and asked Hughes to open the door. Speaking through the door, Hughes asked the officers whether they had a warrant, and she refused to open the door after being told they did not. Minster then heard someone running inside the residence, who he assumed was O'Dell. The officers retrieved a pick and ram to bust open Hughes's door, at which point Hughes opened the front door. Hughes was pushed to the ground, handcuffed, and placed in the backseat of a patrol car. The officers did not find anyone in the house.

Pederson then met up with Minster and told him, "I'm going [to] go ahead and clear the backyard," and Minster approved. Conley and Pederson then proceeded through the backyard toward a 7' x 7' x 7' shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, clothes locker (which may have been open), clothes, and other belongings. The deputies did not knock and announce their presence at the shack, and Conley "did not feel threatened." Approaching the shack from the side, Conley opened the wooden door and pulled back a blue blanket used as a curtain to insulate the shack. The deputies then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. Conley yelled "Gun!" and both deputies fired fifteen shots in total. Other nearby officers ran back toward the shots, and one officer shot and killed a dog.

The tragedy is that in fact, Mendez was holding only a BB gun that he kept by his bed to shoot rats that entered the shack; as the door was opening, he

was in the process of moving the BB gun so he could sit up in bed. The district court found that the BB gun was pointed at the deputies, although the witnesses' testimony on that point was conflicting and the court recognized that Mendez may not have intended the gun to point that direction while he was getting up. Both Mendezes were injured by the shooting. Mr. Mendez required amputation of his right leg below the knee, and Ms. Mendez was shot in the back.

The Mendezes sued Conley and Pederson under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. After a bench trial, the district court held that the deputies' warrantless entry into the shack was a Fourth Amendment search and was not justified by exigent circumstances or another exception to the warrant requirement. The district court also held that the deputies violated the Fourth Amendment knock-and-announce rule. The court concluded that given Conley's reasonably mistaken fear upon seeing Mendez's BB gun, the deputies did not use excessive force when shooting the Mendezes, *see Graham v. Connor*, 490 U.S. 386 (1989), but the deputies were liable for the shooting under our circuit's provocation rule articulated in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). The court also held that its conclusions in each respect were supported by clearly established law and that the officers were not entitled to qualified immunity. The Mendezes were awarded roughly $4 million in damages for the shooting, nominal damages of $1 each for the unreasonable search and the knock-and-announce violation, and attorneys' fees. The deputies filed a notice of appeal, as well as a motion to amend the judgment arguing that the district court erred in

denying qualified immunity. The district court denied the motion, and the deputies filed a second notice of appeal as to that decision. The Mendezes filed a cross-appeal challenging aspects of the district court's factfinding in case we were inclined to grant qualified immunity on the facts as found by the district court.[4]

II

We review de novo the district court's post-trial denial of qualified immunity, construing the facts in the light most favorable to the factfinder's verdict and the nonmoving parties. *Cal. Highway Patrol*, 712 F.3d at 452-53. The court's factual findings are reviewed for clear error. *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1088 (9th Cir. 2015).

Law enforcement officers are entitled to qualified immunity from damages unless they violate a constitutional right that "was clearly established at the time of the alleged misconduct." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013) (citations omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). But "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "[T]he salient question . . . is whether the state of the law" at the time of the events (here, October 2010) gave the deputies "fair warning" that

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[4] The Mendezes state that they waive their cross-appeal if we affirm the district court's award of monetary damages for the shooting.

their conduct was unconstitutional. *Id.* In other words, an officer is entitled to qualified immunity unless existing case law "*squarely governs* the case here." *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

III

A

We start by analyzing the legality of the deputies' entry into the wooden shack. The deputies first argue that they did not "search" the shack within the meaning of the Fourth Amendment when Conley opened the door.

In 2010, the law was clearly established that a "search" under the Fourth Amendment occurs when the government invades an area in which a person has a "reasonable expectation of privacy." *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2005) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This includes the "area immediately adjacent to a home," known as the "curtilage." *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (citation omitted). Four factors used to determine whether an area lies within the curtilage are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

The deputies contend that not every reasonable officer would have assumed that this "dilapidated" shack was a dwelling. This assertion is irrelevant, as it erroneously assumes that the Fourth Amendment applies only to residences. *See Dunn*, 480 U.S. at 307-08 ("[T]he general rule is that the curtilage includes all outbuildings used in connection with a residence, such as garages, sheds, and barns connected with and in close vicinity of the residence.") (citation and internal alterations omitted); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001) (en banc) (holding that a shed may be protected under the Fourth Amendment and remanding for district court to answer the question in first instance). In *Struckman*, we held that a "backyard—a small, enclosed yard adjacent to a home in a residential neighborhood—is unquestionably such a 'clearly marked' area 'to which the activity of home life extends.'" 603 F.3d at 739 (citation omitted).

In this case, the trial court found that the shack was thirty feet from the house; it "was not within the fence that enclosed the grassy backyard area" but "was located in the dirt-surface area that was part of the rear of the Hughes property" and could not be observed, let alone entered, "without passing through the south gate and entering the rear of the Hughes property." These facts support a finding that the shack was in the curtilage. Therefore, it was clearly established under *Struckman* and *Dunn* that the deputies undertook a search within the meaning of the Fourth Amendment by entering the rear of Hughes's property through a gate and by further opening the door to the shack in the curtilage behind the house. The deputies' citations to cases involving

"abandoned property" are inapposite because even if the shack was "dilapidated," the officers knew that Hughes lived in the house, and the shack was very clearly in the curtilage of the house.

The district court correctly determined that the deputies conducted a search within the meaning of the Fourth Amendment under clearly established law.

B

The deputies next argue that they are entitled to qualified immunity because a reasonable officer could have thought that exigent circumstances justified the search.

A warrantless search "is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citing *Kentucky v. King*, 563 U.S. 452, 459-62 (2011)). The exigent circumstances exception encompasses situations in which police enter without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," while "in hot pursuit of a fleeing suspect," or "to prevent the imminent destruction of evidence." *King*, 563 U.S. at 460 (citations omitted) (collecting cases).

The deputies primarily argue that "[a]n officer may enter a third party's home to effectuate an arrest warrant if he has probable cause or a reason to believe the suspect is within, and exigent circumstances support entry without a search warrant." Although the question is quite debatable, we will assume without deciding that the officers were not "plainly incompetent" in concluding they had probable cause to believe that O'Dell was in the shack behind Hughes's

house. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013).[5] Even with probable cause, clearly established law indicates the unlawfulness of the deputies' entry into the shack in this case.

As the Supreme Court held in *Steagald v. United States*, 451 U.S. 204 (1981), exigent circumstances to enter a home do not exist merely because the police know the location of a fugitive, even if they possess an arrest warrant for that person. *Id.* at 211-12. In *Steagald*, the police received a tip from a confidential informant regarding the location of "a federal fugitive wanted on drug charges." *Id.* at 206. The officers executed an arrest warrant at that location two days later, but the Court held that the search-warrantless entry could not be justified absent exigent circumstances. *Id.* at 211-12. The Court rejected the view that "a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched." *Id.* at 207 n.3. *Steagald* establishes that in this case, the fact that the deputies suspected O'Dell to be in the shack was not, by itself, sufficient to justify the warrantless search.

Although the deputies do not use the phrase "hot pursuit," their exigency argument seems to be premised

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[5] To mention just one consideration, O'Dell was supposedly spotted riding a bicycle in front of Hughes' house. Unless he was riding in circles, he would have passed the house before the officers arrived. The original group of officers recognized this, as some of them went to another house to look for O'Dell. But we have no reason to further address the probable cause question, as we may affirm while assuming the district court's probable cause predicate.

on that doctrine.[6] The hot pursuit exception typically encompasses situations in which police officers begin an arrest in a public place but the suspect then escapes to a private place. *United States v. Santana*, 427 U.S. 38, 42-43 (1976). In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court upheld a warrantless entry into a home when "police were informed that an armed robbery had taken place, and that the suspect had entered [the home] less than five minutes before they reached it." *Id.* at 298. By contrast, the Court concluded in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), that the state's hot pursuit argument was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

As a preliminary matter, a police officer spotting O'Dell, a wanted parole-violator, outside of a grocery store does not appear to qualify as pursuit from "the scene of a crime" as in *Warden* or *Welsh*. But even assuming the hot pursuit doctrine applies, *Welsh* explains why the deputies here are not entitled to qualified immunity. In *Welsh*, a witness "observed a car being driven erratically" and called the police, but the driver abandoned his car and "walked away from the scene." 466 U.S. at 742. Police arrived "[a] few minutes later" and, after determining that the owner of the car was Welsh, the police walked to Welsh's residence "a short distance from the scene." *Id.* at 742-43. Without securing a warrant or consent, the

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[6] Indeed, the other three possibilities listed in *King*—that officers entered to render emergency assistance to an injured occupant, to protect an occupant from imminent injury, or to prevent the imminent destruction of evidence, *King*, 563 U.S. at 460—do not fit the circumstances presented here.

police entered and arrested Welsh. *Id.* at 743. The Court held that the entry was not valid under the hot pursuit doctrine because "there was no immediate or continuous pursuit of the petitioner from the scene of a crime." *Id.* at 753.

Our court, sitting en banc, applied *Welsh* to a situation in which police officers broke into a fenced yard in search of a man who escaped while police were arresting him on an outstanding warrant. *Johnson*, 256 F.3d at 898-900, 907-08. We concluded that the search in that case was not "continuous" because the officers had seen the suspect run into the woods but lost sight of him for "over a half hour" before they entered the property at issue. *Id.* at 907–08. "[A]ny other outcome," we cautioned, "renders the concept of 'hot pursuit' meaningless and allows the police to conduct warrantless searches while investigating a suspect's whereabouts." *Id.* at 908.

Welsh and *Johnson* squarely govern this case and clearly establish that the hot pursuit doctrine does not justify the deputies' search of the shack. Officer Zeko spotted a person he thought was O'Dell outside the grocery store, but that was the last time any policeman saw him before the search took place, which the record suggests was about one hour later. While the deputies received additional information about O'Dell's possible location from the confidential informant, the location identified was outside Hughes' home, not in the house or the shack behind it. And the officers still did not enter the shack until at least fifteen minutes after learning that O'Dell was outside Hughes' home. Moreover, the officers were far from sure that O'Dell was still (or had ever been) inside Hughes's house—let alone in the shack—as evi-

denced by the fact that they simultaneously searched a house down the street. As in *Welsh*, "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." 466 U.S. at 753. And as *Johnson* established, *Welsh* applies when the police enter the backyard of a third-party to look for a suspect, even when the suspect has evaded prior attempts at arrest (as O'Dell apparently had). *Johnson*, 256 F.3d at 899-900, 907.

The deputies also try to justify the warrantless entry based on a threat to the officers' safety, urging that O'Dell had been categorized as armed and dangerous. But *Steagald* and *Johnson* both counsel that exigent circumstances do not exist just because the police are dealing with a fugitive, even if he is wanted on serious federal drug charges. *Steagald*, 451 U.S. at 207; *Johnson*, 256 F.3d at 900, 908. Moreover, Conley testified that he was not aware of O'Dell's categorization and did not have any information about O'Dell. Conley explained that his gun was drawn during the search because he "intermittently" used the light on his gun to "see what was inside of the sheds." A search cannot be considered reasonable based on facts that "were unknown to the officer at the time of the intrusion." *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005). And even if we assume that Pederson knew about the characterization, the district court found that "the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack," which explains why Conley "did not feel threatened" before entering the shed. The deputies correctly assert that the exigent circumstances inquiry is objective, not subjective, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), but the information they

had at the time, as confirmed by the conclusions they reached on the scene, is certainly pertinent. We agree with the district court that these facts support a conclusion based on the objective "totality of the circumstances" that the deputies "failed to demonstrate 'specific and articulable facts'" of an exigency.[7]

While the deputies' brief urges that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," (emphasis in brief) (quoting *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam)), that argument is inconsistent with the fact that the deputies here did not fear imminent violence. We agree with the district court that on this record the deputies did not demonstrate specific and articulable objective facts of an exigency that would meaningfully differentiate this case from clearly established law.

C

Next, the deputies argue that they could have reasonably assumed that Hughes had consented to a search of the shack. The district court assumed for the sake of analysis that Hughes had authority to consent to a search of the shack, but it reasoned that even if Hughes had allowed the officers to enter her home after officers brought a pick and ram from their patrol car and set the pick against the door, any "consent" was "coerced and consequently invalid."

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[7] The deputies' brief also contends that there was a possibility of ambush arising from other debris in the yard, including parked cars, but even if so, a threat of ambush from other structures would not justify searching the shack.

The deputies argue that because they spoke to another officer (Sergeant Minster) in the Hughes residence before searching the shack, "the defendants would assume the officers were lawfully in the main residence," and they "could reasonably believe the sergeant obtained consent for the search" of the shack.

We are not persuaded by this argument. Given the deputies' position that they lawfully entered the backyard pursuant to an exigent circumstance, it is unclear why the deputies would have thought that the other officers had gained consent to search the house rather than having relied on exigent circumstances as well. And the deputies point to no facts in the record suggesting that they knew Hughes had consented to a search of the shack. The district court correctly determined that the deputies could not have reasonably believed that their search of the shack was consensual.

D

Finally, the deputies argue that their search of the shack was a lawful protective sweep. We note that there is both a split between the circuits and a split within our circuit as to whether a protective sweep may be done "where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest." *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (collecting cases, including *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000), and *United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993)). We assume without deciding that the protective sweep doctrine could apply here. And, although the question is subject to debate, *see* n.5, *supra*, we further assume without deciding that the

deputies' entry into Hughes's house was lawful and a protective sweep could be proper if all other requirements were met.

The district court determined that the officers did not conduct a lawful protective sweep because, even assuming that entry into the Hughes residence was constitutional, the deputies' authority to conduct a protective sweep did not extend to the shack. The court concluded that "there is clearly established law requiring a separate warrant for a separate dwelling, especially when officers are aware of the separate dwelling's existence," so lawful presence in the house did not justify sweeping the shack.

We need not decide whether the district court's qualified immunity analysis was correct, as the deputies' protective sweep argument fails for another reason. To justify a protective sweep, police must identify "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Buie*, 494 U.S. at 327 (internal citations, alterations, and quotation marks omitted). The deputies are incorrect when arguing that even if "there were no exigent circumstances to permit a search of the shed, a reasonable officer could have believed it was proper to search the shed as [part of a] protective sweep." As we have explained, "the protective sweep and exigent circumstances inquiries are related." *United States v. Furrow*, 229 F.3d 805, 811 (9th Cir. 2000), overruled in part on other grounds by Johnson, 256 F.3d at 914. For the same reasons that exigent circumstances did not justify entry into the shack, *see* section III.B., *supra*, the

deputies did not have the requisite suspicion of danger to justify a protective sweep.

For the foregoing reasons, we hold that the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant.

IV

The district court also concluded that the deputies violated clearly established law because they did not knock-and-announce their presence at the shack before they entered it. We hold that the deputies violated the knock-and-announce rule, but our law in 2010 was not clearly established in this respect. We reverse on this count and remand for the district court to vacate the nominal damages on this claim.

A

The Fourth Amendment knock-and-announce rule requires officers to announce their presence before they enter a home. *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995). Police may be exempt from the requirement, however, when "circumstances present[] a threat of physical violence." *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997) (quoting *Wilson*, 514 U.S. at 936). The district court determined here that because the shack was a separate residence, a fact that the officers knew or should have known, the officers were required to announce their presence at the shack, and that no exception applied for the same reasons that there was no exigency to enter for officer safety.

For the reasons stated above, the district court correctly concluded that no exigency exception

applied. *See also United States v. Granville*, 222 F.3d 1214, 1219 (9th Cir. 2000) (holding that a no-knock entry was not justified because the government did not "cite any specific facts" suggesting that Granville posed a threat to the officers). In *Granville*, we explained, "The government simply relies on generalizations and stereotypes that apply to all drug dealers. Our cases have made clear that generalized fears about how drug dealers usually act or the weapons that they usually keep is not enough to establish exigency." *Id.* Here, the deputies similarly rely on a stereotypical characterization of all parolees-at-large as a threat without pointing to any specific facts known about O'Dell. We conclude that the knock-and-announce exigency exception does not apply.

The officers did, however, announce their presence at Hughes' front door, and we disagree with the district court that existing case law squarely governs the question whether the deputies needed to announce their presence again before entering the shack in the curtilage. We have stated that "officers are not required to announce at [e]very place of entry," *United States v. Valenzuela*, 596 F.2d 1361, 1365 (1979) (citation omitted) (holding that there is no requirement to knock at a garage after properly entering home), and we are not aware of case law clearly establishing that officers must re-announce their presence at a shack in the curtilage, even if it was obvious that it was being used as a residence.

Concluding otherwise, the district court relied on *United States v. Villanueva Magallon*, 43 F. App'x 16 (9th Cir. 2002), which held that the knock-and-announce rule was <u>not</u> violated during the search of

a separate house (#784) on the same property because "Villanueva possessed and controlled both 792 and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18. The district court reasoned that because the shack in this case was being used as a separate residence by a third party, a knock was required. But *Villanueva Magallon* also stated that officers are not required to knock and announce "at each additional point of entry into structures within the curtilage." *Id.* at 18. Because the shack here was in the curtilage, *Villanueva Magallon* does not clearly prohibit the deputies' actions here.

The district court also relied on the proposition in *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001), that entry into a separate dwelling (in *Cannon*, a rental unit in the rear of the house) requires a separate warrant. This proposition is at too high a level of generality to constitute clearly established law on the question whether police are required to separately knock and announce their presence at a shack in the curtilage. *Mullenix*, 136 S. Ct. at 308 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))).

In the absence of clearly established law that squarely governs the situation here, qualified immunity is appropriate on the knock-and-announce claim. *Id.* at 309. We reverse and remand for the district court to vacate the award of nominal damages on this claim.

B

To clearly establish the law going forward, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), we hold that the deputies violated the Fourth Amendment when they failed to knock at the shack. We do not retreat from the general principle that "officers are not required to announce at [e]very place of entry" within a residence. *Valenzuela*, 596 F.2d at 1365. But we agree with the district court that the deputies here should have been aware that the shack in the backyard was being used as a separate residence. The deputies were told that a couple was living behind the house, and the shack itself was surrounded by an air conditioning unit, electric cord, water hose, and clothes locker. And parallel to the district court's reasoning that a knock should be required for a separate residence just as a warrant is, *see Cannon*, 264 F.3d at 879, we hold that officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.

This rule is supported by the purposes of the knock-and-announce rule, which is designed to protect our privacy and safety within our homes. *United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994). We have recognized that when officers fail to knock and announce, they risk the "violent confrontations that may occur if occupants of the home mistake law enforcement for intruders." *United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005). Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the

officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.

V

Although the district court held that the deputies' shooting of the Mendezes was not excessive force under *Graham v. Connor*, 490 U.S. 386 (1989), the district court awarded damages under the provocation doctrine. "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (citing *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)). Here, the district court held that because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper. We agree.

The deputies argue first that the provocation doctrine is inapplicable because they did not "provoke a violent response by plaintiffs." In other words, they claim that because Mr. Mendez did not intend to threaten the officers with his gun, he was not responding to the deputies' actions and they did not "provoke" him. We reject this argument. Our case law does not indicate that liability may attach only if the plaintiff acts violently; we simply require that the deputies' unconstitutional conduct "created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010). And the consequences of the deputies' position make that position unpersuasive.

On their theory, Mendez would ostensibly be entitled to damages if after entry he had intentionally pointed a weapon at the police while shouting "I'll kill you," but here he would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police.

Moreover, this case does not require us to extend the provocation doctrine; we have applied provocation liability in a similar circumstance without requiring the plaintiff to show he acted violently. In *Espinosa*, we found that liability under *Alexander-Billington* was possible when officers entered an attic and shot a man because an officer "believed that he saw something black in [the man's] hand that looked like a gun," even though the suspect "had not brandished a weapon, spoken of a weapon, or threatened to use a weapon" and "in fact, did not have a weapon." 598 F.3d at 533, 538–39. *Espinosa* thus indicates that the provocation doctrine can apply here even though Mendez did not act violently in response to the deputies' entry.

The deputies also argue that they did not intentionally or recklessly violate Mendez's rights, a prerequisite to provocation liability. *See Billington*, 292 F.3d at 1189. But because qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law," *Stanton*, 134 S. Ct. at 5 (citation and internal quotation marks omitted), our determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights. And the record here bears out Conley and Pederson's recklessness—without a reasonable belief of exigent

circumstances, the deputies entered Hughes's property and proceeded to search a shack in an attempt to execute an arrest warrant for a parolee that, at most, may have been on the property, contrary to *Steagald*, 451 U.S. at 211-12, and *Johnson*, 256 F.3d at 907-08. Indeed, the deputies appear to have been simply "conduct[ing] warrantless searches while investigating a suspect's whereabouts," *id.* at 908, which *Johnson* explicitly forbids, *id.*, and *Welsh* prohibits by implication, 466 U.S. at 753.

Finally, even without relying on our circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause.[8] The Supreme Court has emphasized that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted).

The district court here, discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008), recognized that when many Americans own firearms "to protect their own homes[, a] startling entry into a bedroom

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[8] This conclusion follows from the Mendezes' argument on cross-appeal that the district court erred by not awarding "reasonably foreseeable" damages jointly on all claims.

will result in tragedy." The court also cited Justice Jackson's decades-old admonition in a case involving a warrantless entry:

> [T]he method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued . . . . Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot . . . . But an officer seeing a gun being drawn on him might shoot first.

McDonald v. United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). Under these principles, the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable. The deputies are therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment. *See Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.").

VI

Lastly, Pederson argues that she cannot be held liable because she did not search the shack. Pederson testified, however, that after clearing the sheds on

the south side of the property, she told Sergeant Minster that she was "going to check the rest of the yard," including the shack. Minster testified similarly. Pederson also approached the shack with her weapon drawn alongside Conley. It is inconsequential that only Conley opened the door and pulled the blanket back from the doorframe while Pederson stood by—under our case law, Pederson was an "integral participant" in the unlawful search because she was "aware of the decision" to search the shack, she "did not object to it," and she "stood armed behind [Conley] while he" opened the shack door. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004).

VII

Because we affirm the district court's conclusion that the deputies are liable for the shooting following their unconstitutional entry, the Mendezes' cross-appeal is waived, and we do not reach the issues therein. The district court judgment is AFFIRMED insofar as it awards damages for the shooting and for the unconstitutional entry. The award of $1 nominal damages for the knock-and-announce violation is REVERSED, and we remand for that nominal damages award to be vacated.

13-56686 is AFFIRMED IN PART and REVERSED IN PART; and 13-57072 is DISMISSED AS MOOT.

DISTRICT COURT ORDER DENYING MOTION TO AMEND THE JUDGMENT OR MAKE ADDITIONAL FINDINGS OF FACTS (NOVEMBER 20, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET AL.,

v.

COUNTY OF LOS ANGELES, ET AL.,

Case No. CV-11-04771-MWF (PJWx)

Before: The Honorable Michael W. FITZGERALD, U.S. District Judge.

This matter is before the Court on Defendants' Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Motion"), which was filed on September 24, 2013. (Docket No. 266). The Court has reviewed and considered the papers on this Motion, and held a hearing on November 18, 2013. For the reasons stated below, the Court DENIES the Motion.

On September 24, 2013, Defendants filed this Motion. (Docket No. 266). On October 21, 2013, Plaintiffs Angel Mendez and Jennifer Lynn Garcia

filed an Opposition to Defendants' Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Opposition"). (Docket No. 273). On November 4, 2013, Defendants filed a Reply to Plaintiffs' Opposition to Motion to Amend the Judgment or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson (the "Reply"). (Docket No. 274). On November 6, 2013, Plaintiffs filed an Objection and Request to Strike Defendants' Reply in Support of Motion to Amend Judgment or Make Additional Findings (the "Request"). (Docket No. 277).

Plaintiffs initiated this action by filing a Complaint on June 3, 2011. (Docket No. 1). The Complaint alleged civil rights and tort claims against Defendants, arising from an incident in which Los Angeles Sheriff's Department deputies entered Plaintiffs' dwelling and shot Plaintiffs. (*Id.*). A trial was held before the Court on February 26, 27, 28, March 1, and April 19, 2013. (Docket Nos. 219, 220, 221, 222, 231). On August 13, 2013, the Court entered Findings of Fact and Conclusions of Law (the "Findings"). (Docket No. 250). On August 27, 2013, the Court entered Judgment in this matter. (Docket No. 256).

As reflected in the Findings and the Judgment, the Court found in favor of Plaintiffs on the following claims: (1) the Fourth Amendment unreasonable search claim (based on warrantless entry); (2) the Fourth Amendment unreasonable search claim (based on failure to knock-and-announce); and (3) the Fourth Amendment excessive force claim (based on *Alexander/Billington* provocation).

The Court found in favor of Defendants on the following claims: (1) the Fourth Amendment excessive force claim (based on conduct at the moment at shooting); and (2) the California tort claims.

I. Request to Strike Reply

Plaintiffs filed the Request, asking that the Court strike the Reply in its entirety because it does not respond to the arguments in the Opposition, but instead, generates new arguments that deprive Plaintiffs of an opportunity to respond. (Docket No. 277).

Plaintiffs are correct that it would be improper to raise new arguments in the Reply. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) ("It is well established in this circuit that "'[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs.'"); *United States v. Boyce*, 148 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001) (stating that because an "argument was not presented in their moving papers," it "should not be considered now, as it is improper for a party to raise a new argument in a reply brief"). However, the Court does not find the Reply to be non-responsive to the Opposition or to raise new arguments.

Therefore, the Court DENIES the Request to strike the Reply in its entirety.

II. Motion to Amend Judgment or Make Additional Findings

Federal Rule of Civil Procedure 52(b) provides: "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its

findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). Rule 59(e) similarly states: "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

The Motion was filed exactly twenty-eight days after the entry of judgment, and thus, was timely.

"Since specific grounds for a motion to amend or alter are not listed in [Rule 52(b)], the district court enjoys considerable discretion in granting or denying the motion" to amend a judgment. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). "But amending a judgment after its entry remains 'an extraordinary remedy which should be used sparingly.'" *Id.* (citation omitted). The Ninth Circuit has indicated that a Rule 59(e) motion may be granted if: (1) "necessary to correct manifest errors of law or fact upon which the judgment rests," (2) "necessary to present newly discovered or previously unavailable evidence," (3) "necessary to prevent manifest injustice," or (4) "justified by an intervening change in controlling law." *Id.*

Virtually all of the arguments in the Motion were raised at trial or could have been raised at trial, and on that basis alone the Motion could be denied. Nonetheless, the Court will address Defendants' specific arguments.

A. Qualified Immunity

Defendants primarily argue that the Court committed manifest legal error in denying qualified immunity to Deputy Conley and Deputy Pederson.

"Qualified immunity protects officers from liability for civil damages where their alleged unconstitutional conduct does not violate a clearly established right." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013). As stated in the Findings (Findings at 14-15), in determining if qualified immunity existed, the Court must consider two questions: (1) was there a violation of a constitutional right, and (2) was that constitutional right clearly established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "[T]he second question requires the court to ask whether a reasonable officer could have believed that his conduct was lawful." *Dixon. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003).

1. Qualified Immunity Based on Exigent Circumstances

Defendants argue that the Court erred in denying qualified immunity because a reasonable officer could have believed that the threat posed by the suspect, Ronnie O'Dell, to the deputies' safety, justified a warrantless search based on exigent circumstances and excused compliance with the knock-and-announce requirement. (Mot. at 5-12).

a) Objective Reasonable Standard

Defendants first argue that the Court erred in focusing its analysis on Deputy Conley's testimony that he did not feel threatened at the time because

the legal standard does not include a subjective component. (*Id.* at 5). Defendants argue that the legal standard is whether a reasonable officer could reasonably believe that exigent circumstances, based on officer safety risk, justified a warrantless search and non-compliance with the knock-and-announce rule. (*Id.* at 5-6).

Defendants are correct that, in determining, whether exigent circumstances justify a warrantless search, "[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987). The specific officer's "subjective beliefs about the search are irrelevant." *Id.*

The Court, however, correctly applied the objective standard in the Findings and analyzed the situation from the perspective of a hypothetical reasonable officer. The Court stated:

> [W]ith respect to officer safety, if [the suspect] was within the shack, he was trapped. There was no apparent threat to officer safety. Tellingly, Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened. If Mr. O'Dell had been elsewhere on the Hughes property, Defendants have failed to show that a search of the shack was 'imperative' to officer safety. Moreover, the possibility that Mr. O'Dell was in the shack hiding but nobody else would have been in the shack was premised

> on the unreasonable belief that the shack was not a dwelling.

(Findings at 31).

There is only one statement in the above analysis that referenced Deputy Conley's subjective belief that "he did not feel threatened." (*Id.*). However, the Court's analysis was not based on Deputy Conley's belief, but rather on "the totality of the circumstances," which did not demonstrate that the warrantless search was justified by a threat to officer safety. (*Id.*) In the next paragraph in the Findings, the Court explicitly stated: "Rather than second-guess Deputy Conley's conduct with the benefit of hindsight, the Court concludes only that Defendants have failed to demonstrate 'specific and articulable facts' justifying a warrantless search of the shack based on any supposed exigency." (*Id.* at 31-32).

Therefore, the Court does not find that it applied the incorrect legal standard to determine whether a threat to the deputies' safety justified a warrantless search based on exigent circumstances.

b) Exigent Circumstances If Suspect Is Trapped

Defendants next argue that the Court erred in concluding that (1) "if [the suspect] was within the shack, he was trapped," and "[t]here was no apparent threat to officer safety," and (2) "[i]f [the suspect] had been elsewhere on the [property], Defendants have failed to show that a search of the shack was 'imperative' to officer safety" (Findings at 31). (Mot. at 10).

Defendants cite to several Ninth Circuit cases in support of the proposition that exigent circumstances

do not disappear if a suspect becomes trapped. However, the cases relied upon by Defendants are inapposite.

Defendants rely on *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) for the proposition that the danger posed by a possibly armed suspect does not dissipate simply because the suspect becomes trapped. (Mot. at 8). However, in *Fisher*, the situation did not include a possibly armed suspect. Instead, the suspect, in fact, was armed, threatened to shoot the police, and pointed his firearm at the police. *Fisher*, 558 F.3d at 1073, 1075. The Ninth Circuit thus described the situation as "an armed standoff," *id.* at 1077, which is distinguishable from the present case, in which deputies were conducting a search for a suspect who may or may not have been on Paula Hughes's property and who was categorized as armed and dangerous.

Additionally, the analysis in *Fisher* focused on whether exigent circumstances that existed at the beginning of the armed standoff dissipated over time. The Ninth Circuit concluded that the law enforcement officers were not required to reassess whether exigency persisted throughout the twelve-hour standoff because the "armed standoff was a single Fourth Amendment event, a continuous process of formalizing [the suspect's] arrest." *Id.* at 1077. The analysis in *Fisher* thus requires that exigent circumstances existed at some point during a Fourth Amendment event. Here, however, the Court did not find that exigent circumstances existed initially or at all in the present case. Therefore, the analysis in *Fisher* appears inapposite.

Similarly, Defendants cite to *United States v. Flippin*, 924 F.2d 163 (9th Cir. 1991) for the proposition that if exigent circumstances exist, they do not dissipate

simply because the item at issue had been seized. (Mot. at 8). In *Flippin*, the Ninth Circuit found that even though the officer had already seized the item he was seeking, the officer's subsequent seizure of the suspect's make-up bag was justified based on exigent circumstances that threatened his safety. *Id.* at 167. However, the exigent circumstances in *Flippin* were the suspect's sudden actions: "Flippin had grabbed the bag as [Officer] Martin turned away. When he asked her for the bag, she refused to relinquish it, forcing him to struggle with her until he gained custody of it." *Id.* In the present case, neither Plaintiffs nor any other individuals committed analogous actions to trigger a search of Plaintiffs' shack.

Additionally, Defendants cite to *United States v. Lemus*, 582 F.3d 958 (9th Cir. 2009) to demonstrate that Deputy Conley risked being ambushed, thereby, justifying a search of Plaintiffs' shack. (Mot. at 9, 11). Although *Lemus* dealt with a different warrant exception, "a protective search incident to [an in-home] arrest," *Lemus*, 582 F.3d at 962, the Court will assume that the risk of ambush could potentially exist during a search for a suspect, and thus, justify a warrantless search based on exigent circumstances.

In the context of this action, Defendants argue that if Deputy Conley were to turn around and walk away from Plaintiffs' shack, he could be ambushed by someone emerging from the shack. (Mot. at 9, 11). However, in support of that argument, Defendants point to testimony by Deputy Conley that he could not use some cars in the yard surrounding the shack for cover because those cars also posed a threat, presumably because someone could be hiding in the

cars. (Docket No. 266, Ex. B., p. 86: 13-22). The Court is simply not persuaded that this testimony indicates a risk of being ambushed from someone inside the shack. Later in their Motion, Defendants also requests that the Court amend its finding that "Deputy Conley could have obtained a warrant 'in time'" (Findings at 31), because there was no guarantee that a potential attacker would not have ambushed the officers from the shed. (Mot. at 21). However, because the record does not establish the threat of ambush existed, the Court declines to amend its finding that Deputy Conley could have obtained a warrant in time.

Alternatively, Defendants argue that "[a]t the very least, the law plainly was not clearly established such that every reasonable officer would have believed their safety was not in jeopardy." (Mot. at 11). However, Defendants have not demonstrated this point, since the cases they rely upon are inapposite.

c) Knock-and-Announce Rule

Defendants additionally argue that the Court erred in finding that that an exception to the knock-and-announce rule was not justified by the potential threat that knocking posed to officer safety. Defendants argue that the knock-and-announce requirement was "clearly excused" because announcing the presence of the officers "presented an extremely dangerous and volatile situation." (Mot. at 12).

As stated in the Court's Findings (Findings at 37): "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime

by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1421, 137 L. Ed. 2d 615 (1997). The analysis, here, is similar to that above with respect to exigency, since both issues turn on whether an officer could reasonably believe that the circumstances posed a danger to the officers' safety.

In support of their argument, Defendants cite to *United States v. Ramirez*, 770 F.2d 1458 (9th Cir. 1985), as an example in which the no-knock exception was justified by the fact that the suspect was considered armed and dangerous. However, *Ramirez* is distinguishable, first, on the ground that the law enforcement officers had confirmed that the targeted suspects were, in fact, at the location to be searched. *Id.* at 1459 (stating that, before entering the apartment, the law enforcement agents saw the suspects' car in their parking stall, and conducted surveillance confirming "that two men were in the apartment, with the lights on and watching TV").

In contrast, here, the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack. During trial, Deputy Conley testified: "I didn't have a specific belief that [Mr. O'Dell] was in fact in there [Plaintiffs' shack]. However, I didn't neglect the fact that he could have been . . . . No. I wouldn't say that I assumed someone was armed and dangerous in there." (Docket No. 266, Ex. B, p. 85: 16-23). Moreover, testimony at trial indicated that O'Dell's classification as armed and dangerous was a standard classification applied to all parolees at large ("P.A.L."). Plaintiffs' expert witness, Roger Clark, testified as following:

Q: In fact, parolees at large are generally considered to be armed and dangerous, correct?

A: That is–I testified in my deposition that has become a standard statement for all P.A.L. notifications or all P.A.L. notifications or all P.A.L. bulletins. And I've seen that. In fact, I can't think of a single P.A.L. bulletin that does not have that phrase.

(Docket No. 266, Ex. C, p. 15:6-12).

Ramirez is further distinguishable in that the danger posed to the officers was heightened by the fact that the suspects' apartment manager "had informed the [suspects] that the FBI was looking for them." *Ramirez*, 770 F.2d at 1461. No analogous factor heightening the risk to officer safety is present, here.

Defendants also cite *United States v. Bynum*, 362 F.3d 574, 582 (9th Cir. 2004) because, there, the Ninth Circuit "stressed that exigent circumstances justify non-compliance with the knock-and-announce rule where the suspect has a gun. (Mot. at 12). *Bynum* "merely confirm[ed] the proposition that the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify noncompliance with the knock and announce requirement." 362 F.3d at 582-83. In *Bynum*, less than seven hours before executing a search warrant, an undercover officer had conducted a controlled buy of crack cocaine from the suspect, during which the suspect carried a loaded semi-automatic pistol and acted erratically. *Id.* at 577-78. Therefore, the Ninth Circuit found that the officers' no-knock entry to execute the search warrant was justified by the officers'

knowledge that the suspect had a gun and that, given the suspect's strange behavior at the undercover buy, he might become violent. *Id.* at 582.

In the present case, the suspect, O'Dell, had been categorized as armed and dangerous, but the deputies had no other indication that the suspect was actually present in the shack or armed, as confirmed by Deputy Conley's testimony above. The tip received by the deputies stated only that a man believed to be the suspect was riding a bicycle in front of a private residence. (Findings at 3).

Therefore, Defendants have not presented any arguments or legal authority persuading the Court that its findings and conclusions regarding the no-knock entry constituted manifest legal error.

2. Qualified Immunity Based on Protective Sweep Doctrine

Defendants argue that the deputies had legal justification to search the main house, based on exigent circumstances and the fact that its owner, Paula Hughes, was on probation. (Mot. at 12-14). Defendants argue that because the deputies were justified in conducting a search of Ms. Hughes's house, they were justified in conducting a protective sweep of Plaintiff's shack. (*Id.* at 14).

The Court first addresses two preliminary matters.

First, Plaintiffs argue that Defendants never raised the protective sweep argument during litigation, and thus, they should be barred from raising it, here. Plaintiffs are correct that "[a] Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have

been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). However, as Defendants point out the deputies repeatedly testified that they were clearing the shack for officer safety reasons. (Reply at 14). Although Defendants did not clearly argue that this testimony supported a protective sweep, as opposed to exigent circumstances, the Court will consider the protective sweep argument because it can be supported by the testimony at trial.

Second, the Court rejects Defendants' argument that a search of Ms. Hughes's house was justified because she was on probation. As Plaintiffs argue, the deputies were unaware that Ms. Hughes was on probation, at the time they entered her home. (Opp. at 13). They did not learn of her probation status until after the search was conducted. (*Id.*). Defendants have not offered any new factual evidence that would justify amending the Court's view on Ms. Hughes's probation status. Therefore, the deputies' initial search cannot be justified as a probation compliance search.

a) Protective Sweep Doctrine

A protective sweep is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* In *Buie*, the Supreme Court distinguished between two types of searches:

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look

> in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. at 334.

While some courts understand *Buie* to have authorized two types of protective sweeps, the Ninth Circuit classifies the first search above as a protective search incident to an in-home arrest, and the second search as a protective sweep. *See Lemus*, 582 F.3d at 963 n.2 (classifying a protective search incident to an in-home arrest as a protective sweep would be "contradictory" because it does not require reasonable suspicion). Defendants argue that the deputies were justified in conducting the second type of search described above, a protective sweep, which requires articulable facts that an individual posing a danger is in the area swept. (Mot. at 14-15).

b) Exigent Circumstances as to Ms. Hughes's House

The crux of Defendants' argument is that a warrantless search of Ms. Hughes's house (based on exigent circumstances) also served as a legal basis for the deputies to conduct a protective sweep of Plaintiffs' shack. A prerequisite to this argument is that a warrantless search of Ms. Hughes's house was justified because of exigent circumstances. (Mot. at

13). Defendants request that the Court make an additional finding on this issue. (*Id.*).

In the Findings, the Court explicitly declined to rule on this issue because it did not answer whether the deputies were justified in conducting a warrantless search of Plaintiffs' shack. (Findings at 30). Following the Ninth Circuit's guidance in *United States v. Cannon*, 264 F.3d 875 (9th Cir. 2001), the Court found that Plaintiffs' shack was a separate dwelling from Ms. Hughes's home, and thus, a warrantless search of Plaintiffs' shack required a separate exception to the warrant requirement. (Findings at 19-23, 30). As indicated below, the reasoning in *Cannon* still applies. Even if a warrantless search of Ms. Hughes's home was justified based on either exigent circumstances or a protective sweep, this finding would not justify a warrantless search of Plaintiffs' shack. Therefore, for the same reasons stated in the Findings, the Court again declines to reach this issue.

c) Protective Sweep as to Ms. Hughes's House

Defendants next argue that the protective sweep doctrine applies to officers performing a search pursuant to a search warrant or exigent circumstances. (Mot. at 15). This argument is premised on the legitimacy of a warrantless search of the main residence.

The courts of appeals disagree on whether a protective sweep can occur outside the context of an arrest. *See* 3A Charles Alan Wright, et al., Fed. Prac. & Proc. Crim. § 677 (4th ed.). Defendants have cited to one case that supports their position. *See United States v. Martins*, 413 F.3d 139, 149-50 (1st Cir. 2005) (finding that because the First Circuit has applied

the protective sweep doctrine to the execution of search warrants, the doctrine should also apply to lawful searches based on exigent circumstances).

Defendants have not pointed to a case holding likewise in this Circuit. But Defendants cite to two Ninth Circuit cases, upholding a protective sweep and a pat-down, respectively, where the officers had obtained consent to enter an apartment. *See United States v. Garcia*, 997 F.2d 1273, 1282 (9th Cir. 1993) (finding a protective sweep proper where officers first gained lawful consent to enter a home); *Flippin*, 924 F.2d at 165 (following a consent entry, no probable cause is needed to pat down for weapons, as long as the pat down is independently justified by reasonable suspicion of a risk to safety). In *Flippin*, the Ninth Circuit stated that the reasoning in *Buie* "plainly implies that, following a consent entry, no probable cause predicate is needed to pat down for weapons, if it is independently justified by a reasonable suspicion that the suspect is armed." *Id.* at 165-66.

Assuming that the reasoning in *Garcia* and *Flippin* would justify a lawful search based on exigent circumstances, the deputies, here, could still only conduct a protective sweep of Ms. Hughes's residence. If exigent circumstances justified a search of Ms. Hughes's property, the deputies were lawfully present only in her dwelling.

Moreover, a protective sweep would require reasonable suspicion that Ms. Hughes's residence harbored an individual posing a danger to the deputies. Defendants notably skipped this step in their argument, and conducted a reasonable suspicion analysis as to Plaintiffs' shack only. (Mot. at 18, 19-21). This omission belies a fatal flaw in Defendants' argument, which is

the conflation of Ms. Hughes's residence and Plaintiffs' shack as a single property for the purposes of the Fourth Amendment warrant requirement.

d) Extension of Protective Sweep Doctrine to Distinct Dwellings

However, Defendants contend that a protective sweep may extend to distinct dwellings located at a single address. (Mot. at 16-17). This contention is the key aspect of Defendants' argument, as it seemingly gets around the requirement of a separate warrant exception for each separate dwelling.

This part of Defendants' argument relies almost entirely on one case, *Gutierrez v. County of Los Angeles*, No. CV 10-7589-CAS (PLAx), 2013 WL 3821602 (C.D. Cal. July 22, 2013), for the proposition that the scope of a protective sweep extends to separate units and detached dwellings. (Mot. at 16). In *Gutierrez*, officers conducted a probation compliance search of a residence, where they had probable cause to believe a probationer lived. *Id.* at *10. The residence consisted of a main house where Christina and Hector Sr. lived, and a separate, unattached apartment at the back of the main house where Hector Jr. lived. *Id.* at *1. The officers searched both the main house and Hector Jr.'s separate apartment without consent. *Id.* The district court found that the officers' search of Hector Jr.'s separate apartment was justified under the protective sweep doctrine because "the evidence in the record indicates that the deputies were only in Hector Jr.'s separate apartment for a short duration of time," and Plaintiffs did "not identif[y] any evidence in the record that the deputies had to force their way into the unit, or that anything was unnecessarily disturbed inside." *Id.* at *11.

Gutierrez, however, can be distinguished in a crucial way. The district court never made a finding that the apartment in *Gutierrez* was a separate dwelling from the main residence. Instead, the court repeatedly referred to the apartment as another "unit" on the property. *See, e.g.*, *Id.* at *2, 11. Accordingly, when considering whether the officers had probable cause to search the apartment, the court relied on the principle that a probation search "is limited to 'those areas of a residence over which the probationer is believed to exercise complete or joint authority.'" *Id.* at *11 (citation omitted). In other words, the court treated the apartment as another area of the residence where the probationer supposedly resided.

In contrast, this Court found that Plaintiffs' shack was a separate dwelling unit (Findings at 19-23) and that Plaintiffs had a reasonable expectation of privacy in the shack (*id.* at 24). This finding was based on numerous facts and a canvass of the pertinent case law. Moreover, this case did not involve an initial probation search as a predicate for the protective sweep.

As a separate dwelling unit, "a separate warrant was required" for the shack. *Cannon*, 264 F.3d at 879. Where a separate warrant is required, a separate exception to the warrant requirement is required. The protective sweep doctrine is simply another exception to the Fourth Amendment's warrant requirement. As such, a protective sweep of Plaintiffs' shack cannot piggyback on the deputies' presumed lawful presence at Ms. Hughes's residence.

Instead, under the logic of Defendants' argument above, a protective sweep of Plaintiffs' shack would be justified by (1) the deputies' lawful presence in Plain-

tiffs' shack, and (2) reasonable suspicion that the shack harbored a dangerous individual. As indicated in the Findings and this Order, Defendants have not demonstrated that the deputies were lawfully present in Plaintiffs' shack.

Because Defendants' argument fails for the above reasons, the Court need not address whether reasonable suspicion justified a protective sweep of the shack (Mot. at 19-21), or whether a protective sweep of the shack required compliance with the knock-and-announce rule (*id.* at 21-22).

Finally, Defendants argue that, at the very least, the law was not clearly established that the deputies could not conduct a protective sweep of the shack. (Mot. at 21). However, in light of *Cannon* and other cases, such as *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), there is clearly established law requiring a separate warrant for a separate dwelling, especially when officers are aware of the separate dwelling's existence. *See, e.g., Garrison*, 480 U.S. at 86-87 (finding that officers "were required to discontinue the search of respondent's apartment as soon as they discovered there were two separate units on the third floor").

B. Damages Based Upon Force by Provocation

Defendants also argue that because the deputies were in Plaintiffs' shack lawfully based on either the exigent circumstances or protective sweep exceptions, there is no independent Fourth Amendment violation supporting provocation under *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) and *Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002) line of cases. (Mot. at 22-23).

However, as demonstrated above, the Court disagrees with Defendants and declines to amend its finding that Deputy Conley violated Plaintiffs' constitutional right to be free from an unreasonable search. (Findings at 32). Accordingly, an independent Fourth Amendment violation supports provocation under the *Alexander/Billington* doctrine. The Court thus declines to amend the damages on this issue.

C. Different and/or Additional Factual Findings

Defendants ask for seven additional or different factual findings, to some of which the Court already alluded.

As indicated above, Federal Rule of Civil Procedure 52(b) authorizes motions to amend the Court's findings. "Motions under Rule 52(b) are 'designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing.'" *Ollier v. Sweetwater Union High School Dist.*, 858 F. Supp. 2d 1093, 1117 (S.D. Cal. 2012). Similar to motions to amend the judgment, "Rule 52(b) motions are appropriately granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law." *Id.* "A motion to amend a court's factual and legal findings is properly denied where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions." *Id.*

First, Defendants request a finding on whether exigent circumstances existed to search Ms. Hughes's house. (Mot. at 23). However, the Court declined to grant this request above because it does not affect

the legal finding as to whether the deputies were justified in searching Plaintiffs' shack.

Second, Defendants appear to ask for a finding that Deputy Conley's testimony demonstrates clear safety concerns. (Mot. at 23-24). This request is vague. The Court cannot determine if Defendants are asking the Court to strike the finding that Deputy Conley did not feel threatened, or whether they are asking the Court to make an affirmative finding that Deputy Conley and other deputies, in fact, felt threatened at the time of the search.

Regardless, the Court disagrees with Defendants' understanding that Deputy Conley's testimony demonstrated "clearly serious officer safety concerns." (Mot. at 24) (emphasis added). Defendants' excerpts from Deputy Conley's testimony indicate that Deputy Conley stated: "I didn't feel threatened at the time. I didn't think I needed assistance. . . . [P]rior to opening the shed, no, I didn't feel threatened." (Docket No. 266, Ex. B, p.89: 12-13, 21-22). Deputy Conley subsequently stated, "if I was to give a knock and notice, then I would feel threatened." (*Id.* at p.90: 4-5). This latter statement, however, does not support a finding that Deputy Conley, in fact, felt threatened. Moreover, with respect to whether the circumstances posed officer safety concerns, the Findings already indicate that the suspect, O'Dell, was a wanted felony suspect, was categorized as armed and dangerous, and had evaded prior attempts to apprehend him. (Findings at 2).

The Court thus declines to accommodate the second request.

Third, Defendants seek an additional finding that Paula Hughes, owner of the main residence, was on probation requiring her consent to search. (Mot. at 24-25). However, the Court has already declined this request, for the reasons stated above.

Fourth, Defendants seek an additional finding that Paula Hughes's house was a known drug trafficking house. (Mot. at 25). However, Defendants have not indicated what evidence supports such a finding. Therefore, the Court does not make this additional finding. Moreover, the phrase itself is too vague.

Fifth, Defendants seek the finding that the evidence did not show that Defendants would or could have seen the hose, cords, and A/C unit in relation to the shed as they were partially covered by tarps, and that the deputies' attention was focused upon finding the parolee-at-large. (Mot. at 25).

However, the evidence doesn't clearly support a finding that it was the tarp that obscured the above items from view. For example, Deputy Conley testified,

> . . . [W]hen we're clearing something, we're looking for threats; so something like a T-shirt, I wouldn't key in on and pay attention to the T-shirt because there would be a threat somewhere else that I'm missing.
>
> [. . .]
>
> I don't remember paying attention to the tarp.
>
> [. . .]

> . . . I didn't even see the air conditioner at the time; however, there were a lot of things on the ground. So I don't think that, even if I did see the electrical cord, that it would– that I would pay any attention to it with the amount of things strewn about the backyard.

(Docket No. 266, Ex. B, at p.82:24 – p.83:13).

The evidence indicates that the deputies may not have been paying attention to certain items, such as the air conditioner, the electrical cord, or even the tarp, because those items were not "threats" in the deputies' minds. This evidence, however, does not demonstrate that it was the tarp that blocked the deputies' view of such items. Therefore, the Court declines this fifth request to amend the findings. Both individual Defendants could have testified as to whether the shack looked different from the photographs in evidence or to anything else relevant to this crucial issue. On this point, the Motion is not to amend the judgment–it becomes a motion to reopen evidence.

Sixth, Defendants seek an additional finding that there is no evidence that the deputies knew the shed had only one door. (Mot. at 25). However, Defendants have not indicated what evidence supports such a finding. Therefore, the Court does not make this additional finding.

Seventh, Defendants seek a different finding that fifty officers were at the Albertson's debriefing. (Mot. at 25). The Findings indicate that "[a]pproximately twelve police officers . . . responded to the Albertson's" and that "[t]he responding officers then met behind the Albertson's to debrief." (Findings at 3). This finding is based on testimony at trial, indicating

that approximately ten to fourteen deputies attended the briefing at Albertson's. Defendants have not indicated what evidence supports a finding that fifty officers were present at the Albertson's debriefing. Therefore, the Court declines to make this additional finding.

D. Award of Future Medical Expenses

Defendants also request that the award of damages for future medical expenses be stricken or reduced to present value, as required under California law. (Mot. at 25). However, as Plaintiffs argue, the damages awarded by the Court already accounted for the reduction to present value. (Opp. at 15-16). It is true that Plaintiffs' damages calculations were inflated and not specific. However, Defendants did not suggest an alternative figure–they attacked Plaintiffs' numbers. The Court, therefore, roughly balanced reasonable numbers with present value and the likelihood of increased health costs over time. The result was a number that is just and, probably, in Defendants' favor.

Defendants are correct that "[t]estimony by actuaries is frequently used to show discount rates and the present value of future benefits." *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 243, 184 Cal. Rptr. 87 (1974), overturned on other grounds, *Canavin v. Pacific Southwest Airlines*, 148 Cal. App. 3d 512, 518, 196 Cal. Rptr. 82 (1983). But Defendants have not demonstrated reduction of future damages to present value must be established by expert testimony.

Accordingly, the Motion is DENIED.

IT IS SO ORDERED.

DISTRICT COURT JUDGMENT AFTER TRIAL (AUGUST 27, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET L.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES,

Defendants..

CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD.
United States District Judge

Following a trial to the Court, the Court entered its Findings of Fact and Conclusions of Law. (Docket No. 250). Consistent with the Findings of Fact and Conclusions of Law, and pursuant to Rules 54(a) and 58(b)(1)(C) of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment on the merits be entered as follows:

1. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on warrantless entry) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered against Defendant Deputy Christopher Conley only,

and in favor of Plaintiffs Angel Mendez and Jennifer Lynne Garcia (now Jennifer Mendez).

2. On Plaintiffs' Claim that Defendants conducted an unreasonable search (based on failure to knock-and-announce) in violation of the Fourth Amendment: Judgment in the sum of $1.00 in nominal damages is entered, jointly and severally, against Defendants Deputies Conley and Jennifer Pederson, and in favor of Plaintiffs

3. On Plaintiffs' Claim that Defendants used excessive force (based on conduct at the moment of shooting) in violation of the Fourth Amendment: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

4. On Plaintiffs' Claim that Defendants used excessive force (based on Alexander/Billington provocation) in violation of the Fourth Amendment: Judgment is entered, jointly and severally, against Defendants Deputies Conley and Pederson, and in favor of Plaintiffs, as follows:

Plaintiff Angel Mendez

a. Past Medical Bills:	$ 721,056.00
b. Future Medical Care:	
i. Prosthesis upkeep and replacement:	$ 407,000.00
ii. Future surgeries:	$ 45,000.00
iii. Psychological care (5 years):	$ 13,300.00
c. Attendant Care (4 hours/day at $12.00/hour)	$ 648,240.00

d. Loss of Earnings:	$ 241,920.00
e. Non-Economic Damages:	$ 1,800,000.00
Total:	$ 3,876,516.00

Plaintiff Jennifer Lynn Garcia (now Jennifer Mendez)

a. Past Medical Bills:	$ 95,182.00
b. Future Medical Care:	$ 37,000.00
c. Non-Economic Damages:	$ 90,000.00
TOTAL:	$ 222,182.00

5. On Plaintiffs' California tort claims: Judgment is entered in favor of Defendants Deputies Conley and Pederson.

/s/ Michael W. Fitzgerald
United States District Judge

DATED: August 27, 2013

DISTRICT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW (AUGUST 13, 2013)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ, ET AL.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, ET AL.,

Defendants.

Case No. CV 11-04771-MWF (PJWx)

Before: Michael W. FITZGERALD, United States District Court Judge

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This matter came on for trial before the Court sitting without a jury on February 26, 27, 28, March 1, and April 19, 2013. Following the presentation of evidence, the parties filed supplemental briefs, and after closing arguments the matter was taken under submission. The Court then ordered, and the parties filed, supplemental briefs regarding *Alexander v. City of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), and *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002).

Having carefully reviewed the record and the arguments of counsel, as presented at the hearing and in their written submissions, the Court now makes the following findings of fact and reaches the following conclusions of law pursuant to Federal Rules of Civil Procedure 52. Any finding of fact that constitutes a conclusion of law is also hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is also hereby adopted as a finding of fact.

I. FINDINGS OF FACT

1. On October 1, 2010, at approximately 12:30 p.m.. Defendants Los Angeles County Sheriff's Department Deputies Christopher Conley and Jennifer (Pederson) Ballis shot Plaintiffs Angel Mendez and Jennifer Lynn Garcia multiple times. Plaintiffs were living together as a couple when the shooting occurred and thereafter married At trial and in these Findings of Fact and Conclusions of Law, they are therefore typically referred to as Mr. & Mrs. Mendez.

2. When shot, Mr. and Mrs. Mendez were lying on a futon in the shack in which they resided. Deputies Conley and Pederson were searching for a parolee-at-large named Ronnie O'Dell.

3. At all relevant times, Deputies Conley and Pederson were acting under color of authority of their employment with the County of Los Angeles ("COLA").

A. The Search for Mr. O'Dell

4. Sergeant Greg Minster was a supervisor for the Lancaster, California Station Target Oriented Policing ("TOP") Team.

5. Among other things, Sergeant Minster's TOP Team tracked parolees-at-large.

6. Deputies Billy J. Cox and Veronica Ramirez were assigned to Sergeant Minster's TOP Team.

7. Prior to October 2010, Sergeant Minster's TOP Team had been searching for, and attempting to apprehend, Mr. O'Dell.

8. Mr. O'Dell was a wanted felony suspect whom the TOP Team categorized as armed and dangerous.

9. There was a warrant for Mr. O'Dell's arrest.

10. Mr. O'Dell had evaded prior attempts to apprehend him.

B. On October 1, 2010, Mr. O'Dell Reportedly Was Spotted at an Albertson's Grocery Store in Lancaster

11. On the morning of October 1, 2010, Officer Adam Zeko observed a man he believed to be Mr. O'Dell entering an Albertson's grocery store located at the intersection of 20th Street and K Street in Lancaster.

12. Officer Zeko reported to the Lancaster Station that he thought he had seen Mr. Odell.

13. Approximately twelve police officers, including Deputies Conley and Pederson, responded to the Albertson's.

14. Deputies Conley and Pederson were partners assigned to the Lancaster Station Community Oriented Policing ("COPS") Unit.

15. However, on October 1, 2010, Deputies Conley and Pederson were directed to supplement and assist Sergeant Minster's TOP Team.

16. Prior to October 1, 2010, Deputies Conley and Pederson did not have any information regarding Mr. O'Dell.

17. Mr. O'Dell was not found or captured at the Albertson's.

C. The Responding Officers Then Met Behind the Albertson's

18. The responding officers then met behind the Albertson's to debrief.

19. During the debriefing session, Deputy Claudia Rissling received a tip from a confidential informant that a man he believed to be Mr. O'Dell was riding a bicycle in front of 43263 18th Street West in Lancaster, a private residence owned by Paula Hughes.

20. The responding officers then developed a plan in light of the tip regarding Mr. O'Dell's whereabouts.

21. A team of officers would proceed to the residence of Roseanne Larsen, which was located at 43520 18th Street West, Lancaster, California.

22. The officers had information that Mr. O'Dell previously had been at the Larsen residence, and the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence.

23. At the same time, Sergeant Minster's TOP Team, as well as Deputies Conley and Pederson, would proceed to the Hughes residence.

24. Deputies Conley and Pederson were assigned to clear the rear of the Hughes property for the officers' safety (should Mr. O'Dell be hiding thereabouts) and cover the back door of the Hughes residence for containment (should Mr. O'Dell try to escape to the rear of the Hughes property).

25. During the debriefing/planning session, Deputy Rissling announced to the responding officers that a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez).

26. Deputies Conley and Pederson heard Deputy Rissling make this announcement. Deputy Pederson testified that she heard the announcement. Deputy Conley testified that he did not recall any such announcement. Either he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made.

D. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Proceeded to the Hughes Residence

27. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson proceeded to the Hughes residence, arriving in three different patrol cars.

1. The Hughes Residence and Property

28. Ms. Hughes lived in a private residence located at 43263 18th Street West in Lancaster, California.

29. The front of the Hughes residence faced east.

30. The rear of the Hughes residence faced west.

31. To the south of the Hughes residence was a gate that led to the rear of the property.

32. If one walked westward through the south gate, one would pass between the Hughes residence (to the north) and three metal storage sheds (to the south).

33. The three storage sheds were located within a concrete wall that ran the length of the southern boundary of the Hughes property.

34. Behind (*i.e.*, to the west of) the Hughes residence, a short, lightweight fence enclosed a grassy backyard area.

35. To the west of the backyard fence the ground surface was dirt, not grassy.

36. There was debris throughout the rear of the Hughes property, including abandoned automobiles located in the northwest corner of the rear property.

2. The Mendez Shack

37. Ms. Hughes and Mr. Mendez were friends from high school.

38. Mr. and Mrs. Mendez lived in a shack located in the rear of the property owned by Ms. Hughes.

39. The shack was located in the dirt-surface area to the rear of the Hughes property approximately thirty feet west of the Hughes residence—*i.e.*, west of the backyard fence, and southeast of the abandoned automobiles.

40. Mr. Mendez had constructed the shack out of wood and plywood.

41. Mr. and Mrs. Mendez had been living in the shack for approximately ten months.

42. Mr. and Mrs. Mendez were not yet married.

43. Mrs. Mendez was five-months pregnant.

44. The shack was approximately seven-feet wide, seven-feet long, and seven-feet tall.

45. The shack had a single doorway entrance that faced east toward the Hughes residence.

46. The doorway was approximately six-feet tall and three-feet wide.

47. In the doorway, from the top of the door-frame, hung a blue blanket.

48. Outside of the blue blanket was a hinged wooden door, which opened to the outside of the shack.

49. Outside of the wooden door was a hinged screen door, which opened to the outside of the shack.

50. The shack did not have any windows or other points of entry or exit.

51. Located a few feet to northeast of the shack was a white gym storage locker that contained clothes, coats and other possessions.

52. There were also clothes and other possessions located a few feet to the east of the shack.

53. There was a tree to the north of the shack and the white gym storage locker.

54. There was a blue tarp covering the roof of the shack.

55. There was an electrical cord running into the shack.

56. There was an electrical cord running into the shack.

57. There was an air conditioner mounted on the north side of the shack.

58. Inside the shack was a full-size futon.

59. The futon ran lengthwise against the back (western) interior wall of the shack.

60. The other (eastern) side of the futon was approximately three feet from the doorway to the shack.

61. Mr. Mendez kept a BB gun rifle in the shack in order to shoot rats, mice and other pests.

62. The BB gun rifle had a black barrel, brown stock and orange safety switch.

63. The butt end of the BB gun rifle had been broken off from the barrel after someone had stepped on it.

64. The Court examined the BB gun rifle at trial, but the BB gun rifle was not admitted as an exhibit. The BB gun rifle closely resembled a small caliber rifle.

65. Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on Mr. and Mrs. Mendez.

E. Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson Approached the Hughes Residence

66. When Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson arrived at the Hughes residence, they observed a bicycle on the front lawn.

67. The officers did not have a search warrant to search the Hughes residence.

68. Sergeant Minster directed Deputies Conley and Pederson to proceed to the back of the Hughes residence through the south gate.

69. Sergeant Minster and Deputies Cox and Ramirez went to the front door of the Hughes residence.

70. Sergeant Minster banged on the security screen outside the front door.

71. Sergeant Minster testified that if both the front door and the security screen had been open, he would have gone to the front door to see if someone was going to come to the front door and then contacted that person.

72. From within the Hughes residence, a woman (Ms. Hughes) asked what the officers wanted.

73. Sergeant Minster asked Ms. Hughes to open the door.

74. Ms. Hughes asked if the officers had a warrant.

75. Sergeant Minster said that they did not, but that they were searching for Mr. O'Dell and had a warrant to arrest him.

76. Sergeant Minster then heard running within the Hughes residence, toward the back of the residence.

77. Sergeant Minster believed Mr. O'Dell was within the Hughes residence.

78. Sergeant Minster directed Deputies Cox and Ramirez to retrieve the pick and ram because Ms. Hughes no longer was communicating from within the residence.

79. Deputy Cox set the pick into the left side of the doorframe.

80. At that point, Ms. Hughes again communicated from within the residence.

81. Sergeant Minster again stated that the officers were looking for Mr. O'Dell.

82. Ms. Hughes responded that Mr. O'Dell was not at her residence.

83. Sergeant Minster again requested that the officers be allowed to search her residence.

84. Ms. Hughes opened the front door and the security screen.

85. Ms. Hughes was pushed to the ground and handcuffed.

86. Deputy Ramirez placed Ms. Hughes in the backseat of one of the patrol cars.

87. Sergeant Minster and Deputy Cox searched for Mr. O'Dell in the Hughes residence.

88. The officers did not find Mr. O'Dell, or anyone else, in the Hughes residence.

F. Deputies Conley and Pederson Cleared the Three Storage Sheds

89. Meanwhile, Deputies Conley and Pederson headed west through the south gate of the Hughes residence—*i.e.*, the gate to the south of the Hughes residence that led to the rear of the property.

90. Deputies Conley and Pederson checked each of three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

91. Deputies Conley and Pederson had their guns drawn because they were searching for Mr. O'Dell, whom they believed to be armed and dangerous.

92. Deputies Conley and Pederson did not find Mr. O'Dell, or anyone else, in the three storage sheds between the Hughes residence and the southern wall bordering the Hughes property.

93. At the time Deputies Conley and Pederson entered the backyard of the Hughes residence, the back door of the Hughes residence was open; Sergeant Minster and Deputy Cox were inside the Hughes residence.

94. Deputy Pederson informed Sergeant Minster that she and Deputy Conley would clear the remainder of the property to the rear of the Hughes residence.

95. Sergeant Minster assented.

G. Deputies Conley and Pederson Approached the Mendez Shack

1. The Deputies' Point of View

96. Deputies Conley and Pederson proceeded west into the dirt-surface area to the rear (west) of the Hughes property.

97. Deputies Conley and Pederson did not have a search warrant to search the shack.

98. Deputies Conley and Pederson did not "knock and announce" their presence at the shack.

99. Deputies Conley and Pederson recognized that the shack had a door.

100. Deputies Conley and Pederson were trained not to approach or stand in front of a door in case there was a threat behind the door.

101. Consequently, Deputies Conley and Pederson approached the shack from the south—*i.e.*, to the left of the door (from the Deputies' point of view).

102. As they approached the shack, Deputy Conley was in front of Deputy Pederson.

103. The wooden door to the shack was closed; the screen door to the shack was open.

104. Prior to opening the door to the shack, Deputy Conley did not feel threatened.

105. Deputy Conley and Deputy Pederson both testified that they did not perceive the shack to be a habitable structure. The Court finds that they acted as they did because they believed the shack to be simply another storage shed, similar to the three on the south side of the property that they had already

searched. Therefore, it was their perception that the only person who might have been in the shack would have been Mr. O'Dell, trying to remain hidden.

106. Having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable. They had been told that the shack was inhabited. The shack was a different structure from the sheds. The shack was in a different location. The following were all indicia of habitation: The air conditioner, electric cord, water hose, and clothes locker.

107. In photographs of the scene admitted into evidence, the door to the clothes locker was open. Neither Mr. Mendez, Mrs. Mendez, nor Deputy Pederson testified to whether the door of the clothes locker was open at the time of the incident. Deputy Conley testified that he did not remember whether the door was open.

108. Deputy Conley opened the wooden door to the shack.

109. Deputy Conley pulled back the blue blanket that was hanging from the top of the doorframe.

110. As Deputy Conley pulled back the blue blanket, Deputies Conley and Pedersen saw the silhouette of an adult male (Mr. Mendez) holding—what they believed to be—a rifle.

2. Mr. and Mrs. Mendez's Point of View

111. Mr. and Mrs. Mendez were napping on the futon inside the shack.

112. Mr. and Mrs. Mendez were lying with their bodies in a north-south direction and with their heads to the north side of the futon/shack.

113. Mr. and Mrs. Mendez were lying side-by-side on the futon with Mrs. Mendez to Mr. Mendez's right—west of him.

114. Mrs. Mendez was closer to the back (western) interior wall of the shack.

115. Mr. Mendez was closer to the door of the shack (on the east side of the shack).

116. Mr. Mendez had the BB gun rifle next to him on the futon—to his left, east of him.

117. The barrel of the BB gun rifle pointed south.

118. When Mr. Mendez perceived the wooden door being opened, he thought it was Ms. Hughes playing a joke.

119. As the wooden door opened, Mr. Mendez picked up the BB gun rifle to put it on the floor of the shack so that he could put his feet on the floor of the shack and sit up.

120. Mrs. Mendez also perceived the door opening but was lying on her right side, facing the back (western) interior wall of the shack.

3. Whether the BB Gun Rifle Was Pointed at Deputies Conley and Pederson

121. The witness testimony conflicts as to how and where Mr. Mendez was holding the BB gun rifle, whether and in what direction he was moving the BB gun rifle, and whether Mr. Mendez pointed the BB gun

rifle (intentionally or otherwise) at Deputies Conley and Pederson.

122. In court, Mr. Mendez attempted a reenactment of his getting out of bed with the BB gun rifle. Based on that demonstration and the testimony of the all the witnesses, the Court finds that the barrel of the BB gun rifle would necessarily have pointed somewhat south towards Deputy Conley, even if the intent of Mr. Mendez was simply to use the BB gun rifle to help him sit-up.

123. Deputies Conley and Pederson perceived Mr. Mendez holding the BB gun rifle.

124. Deputies Conley and Pederson reasonably believed that the BB gun rifle was a firearm rifle.

125. Deputies Conley and Pederson reasonably believed that the man (Mr. Mendez) holding the firearm rifle (a BB gun rifle) threatened their lives.

H. Deputies Conley and Pederson Fired Their Guns

126. Almost immediately, Deputy Conley yelled, "Gun!"

127. And, almost immediately, both Deputies Conley and Pederson fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed.

128. At the time they fired their guns, neither Deputy Conley nor Deputy Pederson saw Mrs. Mendez.

129. Mr. Mendez screamed, "Stop shooting! Stop shooting!"

130. Deputy Conley fired ten times while moving backward (east) away from the shack.

131. Deputy Pederson fired five times while moving backward (east) and to her left (south).

132. According to their training, Deputies Conley and Pederson were "shooting and moving" until there was no threat.

133. Mr. O'Dell was not found in the shack or captured elsewhere that day.

134. No one was inside the shack other than Mr. and Mrs. Mendez.

I. Mr. and Mrs. Mendez Were Injured

135. The gunshots injured both Mr. and Mrs. Mendez.

136. Mr. and Mrs. Mendez were shot multiple times and suffered severe injuries.

137. Mr. Mendez was shot in the right forearm, right shin, right hip/thigh, right lower back, and left foot.

138. Mr. Mendez's right leg was amputated below the knee.

139. Mrs. Mendez was shot in the right upper back/clavicle, and a bullet grazed her left hand.

140. The Sheriff's Department documented nine bullet holes in and around the shack and collected four bullets.

141. The Sheriff's Department did not determine which bullets were fired from Deputy Conley's gun and which were fired from Deputy Pederson's gun.

142. The Sheriff's Department did not determine how many or which bullets struck Mr. and/or Mrs. Mendez or whether Deputy Conley or Deputy Pederson fired each or any of the bullets that struck Mr. and/or Mrs. Mendez.

J. Damages

143. Mr. and Mrs. Mendez's medical bills were admitted into evidence.

144. Jalil Rashti, M.D., an orthopedic surgeon, testified to his treatment of Mr. and Mrs. Mendez.

145. Dr. Rashti also testified to Mr. and Mrs. Mendez's future medical care and provided an estimate as to the cost of future attendant care for Mr. Mendez.

146. There was no testimony regarding Mr. or Mrs. Mendez's life expectancy.

147. Mr. Mendez testified that, prior to the incident, he had earned from $1,400 to $2,400 per month as a construction "freelancer" or "gopher," landscaping, and working for a sanitation company.

148. Mr. Mendez also testified that he had not worked since 2008.

149. Mr. and Mrs. Mendez each testified to their emotional and psychological suffering.

150. Lawrence J. Coates, Ph.D., a licensed psychologist, testified to his treatment of Mr. and Mrs. Mendez.

151. Plaintiffs filed a Statement of Damages. (Docket No. 230). Defendants filed Objections to Plaintiffs' Statement of Damages. (Docket No. 234).

Certain of the objections were well taken; moreover, certain requested amounts were logically unsupported or simply grandiose. Nonetheless, some amount of damages for certain categories are undoubtedly deserved. The Court examined the underlying exhibits and used common sense in deciding the various sums for damages.

152. The position of Plaintiffs is that Mr. Mendez's life expectancy is 81 years but did nothing to establish that number in the record. To the limited extent it matters, the Court believes that 70 years would be more appropriate, given the pre-shooting circumstances of Mr. Mendez's life.

153. The Court did not discount the medical damages to the present value, in recognition of inflation in general and the undoubted rise in the costs of medical care in particular. The Court discounted the requested amount of future earnings, both because of the sporadic nature of Mr. Mendez's employment as a manual laborer and very roughly to reflect present value.

II. CONCLUSIONS OF LAW

Pursuant to 42 U.S.C. § 1983, Mr. and Mrs. Mendez allege various claims under the Fourth Amendment (as applied to Defendants through the Fourteenth Amendment) of the United States Constitution. Mr. and Mrs. Mendez also allege several related California tort claims. Defendants argue that Mr. and Mrs. Mendez's Fourth Amendment claims fail because Deputies Conley and Pederson are shielded from liability by qualified immunity, and that Mr. and Mrs. Mendez's tort claims fail because the Deputies' conduct was reasonable under the circumstances.

A. Qualified Immunity

When the defense of qualified immunity is raised, there are two threshold questions a court must answer. First, was there a violation of a constitutional right? Second, was that right clearly established? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Under the second *Saucier* prong, the question is whether the constitutional right at issue was clearly established "'in light of the specific context of the case.'" *Scott*, 550 U.S. at 377 (quoting *Saucier*, 533 U.S. at 201). "Under *Saucier*'s qualified immunity inquiry, the second question requires the court to ask whether a reasonable officer could have believed that his conduct was lawful." *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003).

"The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed.2d 1068 (2004)).

Furthermore, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*,— U.S.—, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012) (citation and internal quotation marks omitted). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (citation and internal quotation marks omitted). "This 'clearly established' standard protects the balance between vindication of

constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably . . . anticipate when their conduct may give rise to liability for damages." *Id.* (citation and internal quotation marks omitted).

However, the "question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (citing *Bull v. City of San Francisco*, 595 F.3d 964, 1003 (9th Cir. 2010) (en banc) ("[T]he specific facts of previous cases need not be materially or fundamentally similar to the situation in question.")); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous pre-existing case law is not required to show that a right was clearly established.") (citations omitted); *see also Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) ("If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand, when there are relatively few cases on point, and none of them are binding, we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results." (citation and internal quotation marks omitted)).

B. Fourth Amendment: Unreasonable Search

Mr. and Mrs. Mendez first argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from an unreasonable search.

Under the Fourth Amendment, "we inquire, serially, whether a search has taken place; whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement; whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive; and, finally, whether the search was conducted in a reasonable manner." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 641-42, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (citations omitted).

The Court addresses each of these elements in turn below.

1. Expectation of Privacy

The United States Supreme Court "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740-41, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (citing cases).

"In accordance with the common law, our Fourth Amendment precedents recogniz[e] . . . that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched." *Minnesota v. Carter*, 525 U.S. 83, 101, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (citation and internal quotation marks omitted). "The claimant must establish that he personally had a legitimate expectation of privacy in the premises he was using and therefore could claim the

protection of the Fourth Amendment with respect to a governmental invasion of those premises." *McDonald v. City of Tacoma*, No. 11-cv-5774-RBL, 2013 WL 1345349, at *3 (W.D. Wash. Apr. 2, 2013) (citing *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

"To establish a constitutionally protected reasonable expectation of privacy, [the plaintiff] must demonstrate both a subjective and objective expectation of privacy." *United States v. Rivera*, 10 F. App'x 617, 620 (9th Cir. 2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)). Mr. and Mrs. Mendez "have the burden of establishing that, under the totality of the circumstances, the search or the seizure violated their legitimate expectation of privacy." *United States v. Silva*, 247 F.3d 1051, 1055 (9th Cir. 2001) (citation omitted).

In this case, the question is whether Mr. and Mrs. Mendez had a legitimate expectation of privacy in the shack.

a. The Mendez Shack Was Within the Curtilage of the Hughes Residence

"The presumptive protection accorded people at home extends to outdoor areas traditionally known as 'curtilage'—areas that, like the inside of a house, 'harbor[] the intimate activity associated with the sanctity of a [person's] home and the privacies of life.'" *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citing *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)).

"[C]ourts have [therefore] extended Fourth Amendment protection to the curtilage to a home,

defining the extent of the curtilage with reference to four factors":

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

Id. at 739 (citation and internal quotation marks omitted) (citing *Dunn*, 480 U.S. at 301). "Every curtilage determination is distinctive and stands or falls on its own unique set of facts." *United States v. Depew*, 8 F.3d 1424, 1426 (9th Cir. 1993).

In this case, the shack was approximately thirty feet from the Hughes residence. While the shack was not within the fence that enclosed the grassy backyard area, it was located in the dirt-surface area that was part of the rear of the Hughes property. Mr. Mendez himself had constructed the shack. Mr. and Mrs. Mendez had lived in the shack for ten months before the date of the incident. Finally, there is no evidence in the record that people passing by the Hughes residence on 18th Street West could observe the shack without passing through the south gate and entering the rear of the Hughes property.

Therefore, under the *Dunn* factors, the shack was within the curtilage of the Hughes residence.

b. Even if the Shack Was Without the Curtilage of the Hughes Residence, It Was a Protected Structure

Moreover, the "Fourth Amendment protects structures other than dwellings. '[O]ne may have a legally sufficient interest in a place other than her own house so as to extend Fourth Amendment protection from unreasonable searches and seizures in that place. [A] structure need not be within the curtilage in order to have Fourth Amendment protection.'" *United States v. Santa Maria*, 15 F.3d 879, 882-83 (9th Cir. 1994) (citing *United States v. Broadhurst*, 805 F.2d 849, 851, 854 n.7 (9th Cir. 1986)) (citing *United States v. Hoffman*, 677 F. Supp. 589, 596 (E.D. Wis. 1988) ("[A] person can have a protected expectation of privacy in buildings (*i.e.*, barns, garages, boathouses, stables, etc.) that are located far outside the area of the curtilage of the home.")) (citing cases); *see also United States v. Burke*, No. CR. S-05-0365 FCD, 2009 WL 173829, at *12 (E.D. Cal. Jan. 23, 2009) ("[A]s with a residence, the court looks to the totality of the circumstances in determining whether a defendant has a legitimate expectation of privacy in a storage area." (citing *United States v. Silva*, 247 F.3d 1051, 1056 (9th Cir. 2001)).

For the same reasons discussed above, even if the shack was without the curtilage of the Hughes residence, the shack was a protected structure.

c. The Shack Was a Separate Dwelling Unit

Regardless of whether the shack was within or without the curtilage of the Hughes residence, "there is no Fourth Amendment rule that provides for pro-

tection only for traditionally constructed houses." *United States v. Barajas-Avalos*, 377 F.3d 1040, 1046 (9th Cir. 2004) (internal quotation marks omitted) (discussing Fourth Amendment rights in twelve-foot travel trailer). "It is quite true that a person has a right to privacy in his dwelling house, or temporary sleeping quarters, whether in a hotel room, a trailer, or in a tent in a public area . . . ." *Id.* at 1055.

"Because the home is accorded the full range of Fourth Amendment protections against unlawful searches and seizures, an unconsented police entry into a residential unit (whether a house, apartment, or hotel room) constitutes a search for which a warrant must be obtained." *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001) (citations and internal quotation marks omitted).

In *Cannon*, there were two structures within the fence that surrounded the defendant's residence at 1250 Hemlock Street in Chico, California. *Id.* at 877. The government agent "reasonably assumed" that the second structure was a garage. *Id.* at 878 (emphasis added) ("In the evidentiary hearing, the district court found that before executing the warrant on 1250 Hemlock, the DEA agent reasonably believed the rear building to be a garage.").

However, the defendant (Mr. Cannon) had converted the rear building from a garage into a self-contained residential unit approximately twenty years earlier. *Id.* Mr. Cook rented the rear building's residential unit from Mr. Cannon. The rear building itself consisted of three areas with separate entrances: Mr. Cook's dwelling unit and two storage rooms. *Id.*

Based on the facts of that case, the Ninth Circuit concluded that the "rental unit was clearly a separate dwelling for which a separate warrant was required" and that it could not "be viewed as an extension of the main house." *Id.* at 879 (citation omitted) ("Similarly, a search of a guest room in a single family home which is rented or used by a third party, and, to the extent that the third party acquires a reasonable expectation of privacy, requires a warrant." (citing *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

Significantly, the Ninth Circuit concluded that Mr. Cook's residential unit was a separate dwelling even though the "entire rear building at 1250 Hemlock qualifie[d] as curtilage of Cannon's residence." *Id.* at 881 ("Cook possessed a reasonable expectation of privacy in the rear building rooms he rented . . . ."). Indeed, the Ninth Circuit concluded further that, on the facts of that case, the "storage rooms were an extension of defendant Cannon's residence." *Id.* garages in Chico had often been converted without permits into student residences. *Id.* at 878. Had the rear structure still been a garage, then the warrant for the main house would have covered that garage as well. *Id.* at 880.

United States v. Greathouse, 297 F. Supp. 2d 1264 (D. Or. 2003), is illustrative. In *Greathouse*, the district court began its analysis by noting the Ninth Circuit's observation in *Cannon* that the "rental unit contained its own kitchen appliances and its own bathroom." *Id.* at 1274. The district court continued:

> The government argues that because the defendant's bedroom was not a self-contained unit with its own appliance and bathrooms,

and because there was no separate lock, number or entrance, the officers necessarily acted reasonably in concluding that the entirety of the residence was occupied in common.

First, I note that the focus under *Maryland v. Garrison* must be upon the reasonableness of the officers' actions under the circumstances. When they entered the residence, they did not know that the defendant in fact kept to himself in his bedroom. However, I disagree with the government's assertion that the physical layout is dispositive. Doorbells, deadbolts and separate appliances are certainly indicia of separate units, but nothing in the case law indicates that these are prerequisites. Nor is there any support for the assumption that unrelated people who share a house, but maintain separate bedrooms have no independent right to privacy in bedrooms maintained for their exclusive use. In this case, there is no dispute that the kitchen, bathroom and living room areas were occupied in common. There is also no dispute that the defendant's bedroom door was closed when the officers and agents entered and that he had a "Do Not Enter" sign posted on his door. There was no lock on the door, no number and no separate door bell.

However, the agents and officers were immediately advised by [another resident] that the defendant was a renter and that he

> lived in the back bedroom on the first floor. It was also apparent to the officers that there was no familial relation between any of the residents; they were simply a group of people sharing a house. I find that, upon learning this information from [the resident], when coupled with the sign on the defendant's door and the apparent absence of any familial or other connection between the residents, the agents at that point should have known there were separate residences within the house and should have stopped and obtained a second warrant for the defendant's bedroom. There is no question that they could have secured the area and obtained a telephonic warrant without fear of destruction of evidence. Their failure to do [so] is an alternative basis for suppression of the evidence.

Id. at 1274-75 (emphasis added).

In *United States v. Flyer*, No. CR051049TUC-FRZ(GEE), 2006 WL 2590460 (D. Ariz. May 26, 2006), the district court distinguished *Cannon* on the facts, concluding that *Cannon* did not "support[] the necessity of a separate warrant to search the defendant's room in this case." *Id.* at *4. In *Flyer*, the district court ruled that "there was no need for a separate search warrant before searching the defendant's room" based on the following facts:

> The defendant's room was within the single family residence described in the affidavit and search warrant There was no separate entrance to his room from the outside of the residence. While he apparently was free to

> eat meals in his room, he had no refrigerator or cooking stove in his room and no separate bathroom. Although his mother described him as a "boarder", she admitted he paid no rent and was free to eat the food she purchased for the household. Although the defendant expected other household members would "respect" his privacy and not enter his room without his consent, he did not affix another lock to his room to insure his privacy. There is no evidence the defendant objected to the search of his room during the execution of the warrant.

Id.

Several other cases that predate *Cannon* are instructive. In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), the police officers obtained and executed a warrant to search the person of Lawrence McWebb and the "premises known as 2036 Park Avenue third floor apartment." *Id.* at 80. While the officers "reasonably believed" that there was only one apartment on the premises, the third floor was divided into two apartments, one occupied by Mr. McWebb and the other by the defendant. *Id.* But before the officers executing the warrant realized that they were in a separate apartment occupied by the defendant, they discovered the contraband that provided the basis for his later conviction. *Id.*

According to the United States Supreme Court,

> If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had

> been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

Id. at 86-87. Therefore, the question was whether the failure of the officers to recognize the overbreadth of the warrant was reasonable. *Id.*

In *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000), the officers secured a warrant to search a "poor house"—"a residence with a large number of subjects residing in a residence designed for one family." *Id.* at 1035. The plaintiffs, who owned the residence, argued that the search violated their constitutional rights because, "even after realizing that there were multiple units within the [plaintiffs'] house, the police searched the entire premises, including the individual residential units." *Id.* at 1038. The Ninth Circuit rejected the defendant officers argument that the "execution of the search was valid because probable cause existed to search the entire premises, not just [the suspect]'s room and the common areas." *Id.* The Ninth Circuit determined that the officers should have realized that the house in fact consisted of a multi-unit residential dwelling, and therefore were obliged to limit their search. *Id.*

Here, *Cannon* is determinative for these reasons:

First, Deputies Conley and Pederson differentiated (or should have differentiated) the shack from the three storage sheds next to (to the south of) the Hughes residence. The shack was located in a different area of the rear of the Hughes property at a distance from the Hughes residence and the storage sheds. The storage sheds were metal. The shack was wood.

Second, Deputies Conley and Pederson observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate residential unit: the shack had a doorway; the shack had a hinged wooden door and a hinged screen door; a white gym storage locker was located nearby the shack; clothes and other possessions also were located nearby the shack; a blue tarp covered the roof of the shack; an electrical cord ran into the shack; a water hose ran into the shack; and an air conditioner was mounted on the side of the shack.

Third, and importantly, Deputies Conley and Pederson had information that a man and woman lived in the rear of the Hughes property. In light of this information, and unlike *Cannon* and similar cases, Deputies Conley and Pederson could not have "reasonably assumed" that the shack was another storage shed.

Therefore, the shack was a separate dwelling unit under *Cannon*.

d. Mr. and Mrs. Mendez Had a Reasonable Expectation of Privacy in the Shack

The "Fourth Amendment protects people, not places." *United States v. Jones*, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012) (citing *Katz v. United States*,

389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Consequently, the question is not whether the shack was a protected structure, but whether Mr. and Mrs. Mendez had a reasonable expectation of privacy in the shack.

Mr. Mendez himself had constructed the shack. Before the date of the incident, Mr. and Mrs. Mendez had lived in the shack for ten months. Their possessions were in or around the shack. It was their home. The fact that Ms. Hughes sometimes would open the door to the shack unannounced to "prank" or play a joke on them is insufficient to show that Mr. and Mrs. Mendez did not have a subjective expectation of privacy in the shack or that this expectation was unreasonable.

Accordingly, Mr. and Mrs. Mendez had a subjective expectation of privacy in the shack. And this expectation was reasonable under *Cannon*.

e. Overnight Guest Status

In addition, the "Supreme Court has carefully examined the surrounding circumstances to determine whether a guest's status is sufficiently like home-occupancy so as to give rise to a reasonable expectation of privacy. In so doing, the Court has distinguished between 'overnight guests' and those who were simply on the premises with the owner's permission":

> In the case of the overnight guest, the Supreme Court reasoned that an overnight guest seeks shelter in the host's home "precisely because it provide[d] him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows." Thus, the

> overnight guest's expectation of privacy is recognized and a shared societal norm. The Court contrasted overnight guests with persons simply present on the premises, even with the owner's permission, and concluded that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."

McDonald, 2013 WL 1345349, at *3 (citing *Minnesota v. Carter*, 525 U.S. 83, 87-90, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)).

Based on the same set of facts, Mr. and Mrs. Mendez—at the very least—were long-term, overnight guests staying within a protected structure within or without the curtilage of the Hughes residence. For the reasons discussed above, Mr. and Mrs. Mendez had a subjective and objective expectation of privacy in the shack.

2. Search

"Under the traditional approach, the term 'search' is said to imply" the following:

> some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or

> intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."

1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1(a) (5th ed. 2012) ("The Supreme Court, quite understandably, has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment.").

Here, Deputy Conley searched the shack when he opened the wooden door and pulled back the blue blanket that hung from the top of the doorframe. Deputy Pederson, however, did not search the shack.

3. Probable Cause/Warrant Requirement

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (citations omitted).

It is undisputed that Deputy Conley did not have a warrant to search the shack, nor do any of the exceptions to the warrant requirement apply.

a. Consent

The "consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415

U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. 218, 228.

The Court assumes for purposes of this analysis that Ms. Hughes could have consented to a search of the shack. Ms. Hughes opened her front door and the security screen only after Sergeant Minster and Deputies Cox and Ramirez had brought the pick and ram out from the patrol car and set the pick against her doorframe. To the extent that this can be construed as "consent," it was coerced and consequently invalid. Nor, for that matter, did Ms. Hughes give any indication of consent to Deputy Conley's search of the shack.

Furthermore, Mr. and Mrs. Mendez did not consent to the search of the shack.

b. Parolee Search

"[B]efore conducting a warrantless search [of a residence] pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." *United States v. Franklin*, 603 F.3d 652, 656 (9th Cir. 2010) (citation and internal quotation marks omitted).

There is no evidence in the record that Mr. O'Dell was a resident of the Hughes residence—on the date

of the incident or otherwise. This warrant exception does not apply.

c. Exigency/Emergency Exceptions

"In particular, [t]here are two general exceptions to the warrant requirement for home searches: exigency and emergency." *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir. 2010) (citation and internal quotation marks omitted). The Ninth Circuit has "described these exceptions as follows":

> The "emergency" exception stems from the police officers' "community caretaking function" and allows them "to respond to emergency situations" that threaten life or limb; this exception does "not [derive from] police officers' function as criminal investigators." By contrast, the "exigency" exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

Id. (citations omitted). "To succeed in invoking these exceptions, the government must . . . show that a warrant could not have been obtained in time." *Id.* (citation and internal quotation marks omitted) (emphasis added). The "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh*

v. Wisconsin, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

Significantly, [t]here's no disputing that the [Supreme] Court considers the curtilage to stand on the same footing as the home itself for purposes of the Fourth Amendment." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1122 (9th Cir. 2010). "When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency." *Sims v. Stanton*, 706 F.3d 954, 960 (9th Cir. 2013) ("[C]urtilage is protected to the same degree as the home . . . ."); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches." (citation omitted)).

d. Exigent Circumstances

"[W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *United States v. Snipe*, 515 F.3d 947, 950 (9th Cir. 2008) (citation and internal quotation marks omitted). "It is clearly established Federal law that the warrantless search of a dwelling must be supported by probable cause and the existence of exigent circumstances." *Struckman*, 603 F.3d at 739 (citation and internal quotation marks omitted).

"[W]hen the government relies on the exigent circumstances exception [to the Fourth Amendment warrant requirement], it . . . must satisfy two requirements: first, the government must prove that the

officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *Id.* (citations omitted).

(i). Probable Cause

"Generally, if a structure is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." *Mena*, 226 F.3d at 1038 (citation omitted). "This rule, however, is not absolute. For example, we have held that a warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect." *Id.* (citations omitted) (concluding that the officers had probable cause to search, at most, the suspect's room and one other room, in addition to the common areas, but not any of the other rooms); *see also United States v. Whitten*, 706 F.2d 1000, 1008 (9th Cir. 1983) ("[A] warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if they are occupied in common rather than individually, if a multiunit building is used as a single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect."); *United States v. Whitney*, 633 F.2d 902, 907-08 (9th Cir. 1980) (discussing exceptions to rule that "when the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched."); *United States v. Gilman*, 684 F.2d 616, 618 (9th Cir. 1982) ("Even if a warrant authorizes the search of an entire premises containing multiple units while reciting probable cause as to a portion of the premises only, it

does not follow either that the warrant is void or that the entire search is unlawful.").

Here, Sergeant Minster and Deputies Cox, Ramirez, Conley and Pederson were proceeding based on the tip from a confidential informant—relayed by Deputy Rissling at the debriefing/planning session behind the Albertson's—that a man he believed to be Mr. O'Dell was riding a bicycle in front of the Hughes residence. When the officers arrived at the Hughes residence, they observed a bicycle on the front lawn. While Deputies Conley and Pederson were to cover the back door of the Hughes residence should Mr. O'Dell attempt to escape to the rear of the property, they also were ordered to clear the rear of the property should Mr. O'Dell be hiding somewhere thereabouts. Nothing about the confidential informant's tip was specific to the Hughes residence as opposed to the rear of the property, including the shack.

Therefore, the officers had probable cause to search for Mr. O'Dell inside the Hughes residence, and Deputy Conley had probable cause to search for Mr. O'Dell inside the shack.

(ii). Exigency

"The exigent circumstances exception is premised on few in number and carefully delineated circumstances, in which the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 743 (citations and internal quotation marks omitted). "We have previously defined those situations as (1) the need to prevent physical harm to the officers or other

persons, (2) the need to prevent the imminent destruction of relevant evidence, (3) the hot pursuit of a fleeing suspect; and (4) the need to prevent the escape of a suspect." *Id.* (citations omitted). "Because the Fourth Amendment ultimately turns on the reasonableness of the officer's actions in light of the totality of the circumstances, however, there is no immutable list of exigent circumstances; they may include some other consequence improperly frustrating legitimate law enforcement efforts." *Id.* (citations and internal quotation marks omitted). "The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances." *Id.* (citation and internal quotation marks omitted).

In this case, an important predicate question is whether the Court should make the determination of exigent circumstances with respect to the Hughes residence and its curtilage or separately as to the shack itself.

Cannon holds that a search of a separate dwelling unit, even if within the curtilage of the main residence, requires a separate warrant. In this case, the shack is akin to the Cook residential unit in *Cannon*. Consequently, if Deputy Conley had had a warrant to search the Hughes residence (and its curtilage), he nevertheless would have needed a separate warrant to have searched the shack itself. *See Cannon*, 264 F.3d 875, 877-79 (separate dwelling required separate warrant).

Therefore, Deputy Conley must invoke a warrant exception as to the shack itself, rather than as to the Hughes residence (and its curtilage). As the Supreme Court has made clear, the "most basic constitutional rule in this area is that searches conducted outside

the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (citation and internal quotation marks omitted). "The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it." *Id.* (citation and internal quotation marks omitted).

The determinative question, then, is whether there was exigency to search the shack itself. Specifically, the question is whether under the totality of the circumstances it was reasonable—on account of exigency—for Deputy Conley to search the shack itself without a warrant.

The question is not whether there was any exigency to search the Hughes residence (and its curtilage). Consequently, the Court reaches no conclusion as to whether Sergeant Minster and Deputies Cox and Ramirez's warrantless search of the Hughes residence was reasonable pursuant to the exigent circumstances exception to the warrant requirement.

With respect to the shack itself, Defendants essentially argue that there was exigency for the warrantless search to prevent Mr. O'Dell's possible escape and for the safety of the five officers on the scene. The shack had a single doorway. If Mr. O'Dell had been within the shack, he was trapped. If Mr. O'Dell had been elsewhere on the Hughes property,

then there was no exigent reason to search the shack. Deputy Conley could have obtained a warrant "in time."

Likewise with respect to officer safety, if Mr. O'Dell was within the shack, he was trapped. There was no apparent threat to officer safety. Tellingly, Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened. If Mr. O'Dell had been elsewhere on the Hughes property, Defendants have failed to show that a search of the shack was "imperative" to officer safety. Moreover, the possibility that Mr. O'Dell was in the shack hiding but nobody else would have been in the shack was premised on the unreasonable belief that the shack was not a dwelling.

Defendants have failed to satisfy their burden in this regard. Rather than second-guess Deputy Conley's conduct with the benefit of the hindsight, the Court concludes only that Defendants have failed to demonstrate "specific and articulable facts" justifying a warrantless search of the shack based on any supposed exigency. Therefore, under the totality of the circumstances, the Court concludes that Deputy Conley's warrantless search was not reasonable pursuant to the exigent circumstances exception to the warrant requirement.

e. Emergency Exception

"The need to protect or preserve life or avoid serious injury is one such justification for what would be otherwise illegal absent an exigency or emergency." *Snipe*, 515 F.3d at 950-51 (citation and internal quotation marks omitted). The Ninth Circuit has "adopt[ed] a two-pronged test that asks whether: (1) considering the totality of the circumstances, law

enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *Id.* at 952.

Similarly, Defendants argue that the "immediate need to protect" the officers themselves presented an emergency justifying the warrantless search of the shack. For the same reasons discussed above, the Court disagrees. There was no emergency to search the shack on the basis of officer safety, and Deputy Conley's search was therefore unreasonable.

Accordingly, Deputy Conley violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search.

f. Qualified Immunity

Defendants argue that Deputy Conley is entitled to qualified immunity in this regard because he was following orders from his superior, Sergeant Minster. But, "[c]ourts have widely held that a party's purported defense that he was 'just following orders' does not occup[y] a respected position in our jurisprudence." *Peralta v. Dillard*, 704 F.3d 1124, 1134 (9th Cir. 2013) (citations and internal quotation marks omitted). "Instead, officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." *Id.* (citation and internal quotation marks omitted); *Dirks v. Grasso*, 449 F. App'x 589, 592 (9th Cir. 2011) ("[The defendants] cite no binding authority holding that following a superior's orders entitles officers to qualified immunity, and none exists.").

Preliminarily, it is not clear that Sergeant Minster ordered Deputy Conley (or Deputy Pederson) to search the shack. Regardless, the question is whether a reasonable officer could have believed that Deputy Conley's conduct was lawful.

Deputy Conley had information that people lived in the rear of the Hughes property. In addition, as discussed above, Deputy Conley observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate dwelling unit. Moreover, Deputy Conley did not have a warrant to search the shack. And, under the totality of the circumstances, no reasonable officer could have believed that a warrantless search of the shack was justified under the exigency or emergency exceptions.

Rather, Deputy Conley opened the door (and pulled back the blanket) to a dwelling in which he knew—or should have known—people lived. Although Deputy Conley was searching for a parolee-at-large, the shack had a single doorway. If Mr. O'Dell had been within the shack, he would have been trapped. He could not have escaped. Regardless of whether Mr. O'Dell was within the shack, there was no apparent threat to officer safety. Deputy Conley himself did not feel threatened prior to opening the door to the shack.

Finally, Sergeant Minster did not tell the Deputies that the shack was not inhabited and did not specifically order them not to provide knock-notice (discussed below).

Every reasonable officer in Deputy Conley's position would have understood that what he was doing violated Mr. and Mrs. Mendez's right to be free from an unreasonable search. Accordingly, Mr. and

Mrs. Mendez's right to be free from an unreasonable search was clearly established in this case.

4. Manner of Entry

a. Knock-Notice

"The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one." *Hudson v. Michigan*, 547 U.S. 586, 589, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (citation omitted). "Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law and is currently codified at 18 U.S.C. § 3109." *Id.* (citation omitted). Finally, in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), the United States Supreme Court concluded that the "rule was also a command of the Fourth Amendment." *Id.* (citation omitted).

"The requirements of [the federal knock-and-announce statute] have been held to cover warrantless searches and entries of a home to make an arrest." William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 6:7 n.2 (2d ed. 2013) (citing cases) (citing *United States v. Flores*, 540 F.2d 432, 436 (9th Cir. 1976) ("[A] warrantless entry normally requires the officer to give notice of his authority and purpose before using force to enter.")). Furthermore, the federal knock-and-announce statute requirements have been incorporated into the Fourth Amendment. *United States v. Valenzuela*, 596 F.2d 824, 830 (9th Cir. 1979).

As the Ninth Circuit has explained,

> The general practice of physically knocking on the door, announcing law enforcement's presence and purpose, and receiving an actual refusal or waiting a sufficient amount of time to infer refusal is the preferred method of entry. This method is preferable because it provides a clear rule that law enforcement can follow. It also promotes the goals of the knock and announce principle: protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.

United States v. Combs, 394 F.3d 739, 744 (9th Cir. 2005) (citations omitted); *Richards v. Wisconsin*, 520 U.S. 385, 387, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997) ("[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.").

There is no dispute that Sergeant Minster and Deputies Cox and Ramirez complied with the knock-notice requirement as to the Hughes residence. Here, however, the question is whether Deputies Conley and Pederson were required to knock-and-announce at the door of the shack itself.

As a general rule, law enforcement officers "are not required to [knock and announce] at each additional point of entry into structures within the curtilage." *United States v. Villanueva Magallon*, 43 F. App'x 16, 18 (9th Cir. 2002) (citations omitted); *see also United States v. Crawford*, 657 F.2d 1041, 1044

(9th Cir. 1981) ("There are no decisions directly on point dealing with [whether], after having complied with the dictates of [the federal knock-and-announce statute] at the front door, the arresting officers were then required to comply with [the statute] at the inner bedroom door. The Ninth Circuit has consistently held that where the first or contemporaneous entry is lawful under [the statute], a defendant cannot complain of the unlawfulness of subsequent entries.").

For example, the Ninth Circuit has "assumed for purposes of the [statutory] knock-and-announce rule . . . that a garage is part of a house." *United State v. Frazin*, 780 F.2d 1461, 1467 n. 6 (9th Cir. 1986); *Valenzuela*, 596 F.2d at 1365 ("[T]he garage entry was made only after the proper entry at the residence, and officers are not required to announce at [e]very place of entry; one proper announcement under [the federal knock-and-announce statute] is sufficient." (citation and internal quotation marks omitted)).

Villanueva Magallon, 43 F. App'x 16, is instructtive. In that case, the government had a warrant to search the premises at 792 Ada Street, Chula Vista, California ("792"). Another garage and house were on the same property—784 Ada Street, Chula Vista, California ("784"). Law enforcement officers entered both 792 and 784 and discovered drugs in the latter. *Id.* at 17. The Ninth Circuit rejected the defendant's argument that, "even if the warrant was valid, the agents did not knock and announce before they entered 784," remarking, "This boots him nothing," because it was "undisputed that the agents did knock and announce at 792." *Id.* at 18.

However, the Ninth Circuit also observed that, "[a]t any rate, nobody was in the house at 784, so [the defendant] cannot show any detriment from th[e] failure" to knock and announce before entering 784." *Id.* More importantly, the Ninth Circuit concluded that the defendant "possessed and controlled both 792 and 784 and, in fact, 784 was not being used as a separate residence by some third, innocent party." *Id.* at 17-18 (emphasis added) ("From the record, it is clear that 784 was within the curtilage of 792.").

Here, as discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate residence being used by third parties—*i.e.*, not Ms. Hughes. Deputies Conley and Pederson, however, did not knock-and-announce at the shack. Under *Cannon* and *Villanueva Magallon*, Deputies Conley and Pederson were required to knock-and-announce their presence at the door of the shack itself.

b. No-Knock Entry Exceptions

The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 514 U.S. at 929 ("[T]he method of an officer's entry into a dwelling [i]s among the factors to be considered in assessing the reasonableness of a search or seizure.").

"This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934 ("[T]he common-law principle of announcement was never stated as

an inflexible rule requiring announcement under all circumstances.").

"*Wilson* and cases following it have noted the many situations in which it is not necessary to knock and announce." *Hudson*, 547 U.S. at 589 "It is not necessary when circumstances presen[t] a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile." *Id.* at 589-90 (citations and internal quotation marks omitted). "We require only that police have a reasonable suspicion . . . under the particular circumstances that one of these grounds for failing to knock and announce exists, and we have acknowledged that [t]his showing is not high." *Id.* at 590 (citation and internal quotation marks omitted) ("When the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do.").

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards*, 520 U.S. at 394. "This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Id.* (citations omitted). "This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Id.* at 394-95.

In this context, however, the Supreme Court has "treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." *United States v. Banks*, 540 U.S. 31, 35, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003).

Moreover, where the "police claim exigent need to enter," the "crucial fact in examining their actions" is the "particular exigency claimed." *Id.* at 39.

The analysis here is similar to that above with respect to exigency/emergency. Defendants again argue that a no-knock entry was justified on the bases of effective apprehension of Mr. O'Dell and officer safety. But the shack had only a single doorway—anyone inside was trapped. And Deputy Conley testified that, prior to opening the door to the shack, he did not feel threatened—there was no apparent danger. If Mr. O'Dell was not within the shack, then there was no exigency for a no-knock entry.

Under the totality of the circumstances of this case, Defendants failed to introduce sufficient evidence that Deputies Conley and Pederson had a reasonable suspicion that knocking-and-announcing would have been dangerous or futile, or that it would have inhibited the effective apprehension of Mr. O'Dell. Given that the knock-and-announce requirement is part of the Fourth Amendment reasonableness inquiry, the Court cannot say that the failure to knock-and-announce in this case was reasonable.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's constitutional right to free from an unreasonable search based on the manner of entry.

c. Qualified Immunity

Again, the determinative question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As discussed above, Deputies Conley and Pederson knew (or should have known) that the shack was a separate dwelling unit. Accordingly, a reasonable officer would have recognized the need to knock-and-announce his presence before searching the shack. Nor would a reasonable officer have believed that knocking-and-announcing would have been dangerous (Deputy Conley himself did not feel threatened before opening the shack door) or futile or would have inhibited effective apprehension of Mr. O'Dell (anyone inside could not have escaped). Indeed, Sergeant Minster recognized the need to provide knock-notice before a search of the main Hughes residence.

Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated that right. Accordingly, Mr. and Mrs. Mendez's right to be free from an unreasonable search—in the absence of Deputies Conley and Pederson's having knocked-and-announced their presence and provided Mr. and Mrs. Mendez with an opportunity to open the door to the shack—was clearly established in this case.

C. Fourth Amendment: Excessive Force (At the Moment of Shooting)

1. Constitutional Violation

Mr. and Mrs. Mendez next argue that Deputies Conley and Pederson violated their Fourth Amendment right to be free from excessive force:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citations omitted).

As recently elaborated by the Ninth Circuit, the *Graham* factors (which are incorporated into the applicable Model Jury Instruction 9.22) "are not exclusive and we must consider the totality of the circumstances." *Gonzalez v. City of Anaheim*,—F.3d—2013 WL 1943326, at *2 (9th Cir. May 13, 2013). The second *Graham* factor, immediacy of the threat posed to other officers or civilians, is characterized as the most important factor. *Id.* at *3.

Courts are directed to give "careful attention to the facts and circumstances of each particular case" noting that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citation omitted). Furthermore, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The reasonableness inquiry is therefore highly fact specific and objective. *See Scott v. Harris*, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"). "A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546,

551 (9th Cir. 2010) (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)).

For example, in *Garcia v. Santa Clara County*, No. C 02-04360 RMW, 2004 WL 2203560 (N.D. Cal. Sept. 29, 2004), it was undisputed that defendant Deputy Dawson shot and killed the decedent (Mr. Garcia). *Id.* at *4. The district court granted the defendants' motion for summary judgment, concluding that "Dawson's use of deadly force was objectively reasonable" and therefore that "no constitutional violation occurred." *Id.* at *8. The evidence in that case established that "Dawson had probable cause to believe that Garcia posed a significant threat of death or serious physical injury to Dawson." *Id.* at *6. "First, Dawson observed that Garcia was in possession of a firearm. Second, Dawson saw Garcia pick up the gun, and begin to twist backwards towards Dawson, and move his arm holding the gun in Dawson's direction. Third, the events occurred during a foot pursuit in which Garcia was attempting to escape." *Id.*

Mr. and Mrs. Mendez do not dispute that Deputies Conley and Pederson's use of deadly force—at the moment of shooting—was objectively unreasonable under the totality of the circumstances. Indeed, in their closing argument, counsel for Mr. and Mrs. Mendez conceded that (again, at the time Deputy Conley opened the shack door) Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives.

Mr. and Mrs. Mendez instead argue that Deputies Conley and Pederson violated the Fourth Amendment because they "created" the incident that led to the shooting. That argument is discussed below.

2. Qualified Immunity

Because Mr. and Mrs. Mendez have failed to prove a violation of their constitutional right to be free from excessive force in this regard, the Court need not reach the question of qualified immunity.

D. Fourth Amendment: Excessive Force (Provocation)

Mr. and Mrs. Mendez's excessive force claim, indeed their entire theory of the case, is premised upon the law of Fourth Amendment provocation. In the Ninth Circuit, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) (emphasis added); *Alexander v. City of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) ("[The] plaintiff argues that defendants used excessive force in creating the situation which caused [the decedent] to take the actions he did.").

The Ninth Circuit has explained this rule as follows:

> In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive

force because their reckless and unconstitutional provocation created the need to use force.

[. . .]

Alexander must be read consistently with the Supreme Court's admonition in *Graham v. Connor* that courts must judge the "reasonableness of a particular use of force . . . from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." That goes for the events leading up to the shooting as well as the shooting. Our precedents do not forbid any consideration of events leading up to a shooting. But neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.

[. . .]

But if, as in *Alexander*, an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.

Billington, 292 F.3d at 1189-91 (citations omitted) (emphasis added).

Reductively, an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation.

1. Predicate Constitutional Violation: Unreasonable Search

For example, in *Federman v. County of Kern*, 61 F. App'x 438 (9th Cir. 2003), the Ninth Circuit concluded that the defendants' illegal entry was (1) a constitutional violation, (2) reckless, and (3) not protected by qualified immunity. Specifically,

> [the] plaintiffs ha[d] alleged constitutional violations: the threshold inquiry under *Saucier*. The Sheriff department's alleged reckless entry of [the decedent]'s home with a SWAT team constitutes excessive force under the Fourth Amendment. This aggressive entry without warning or a warrant, to detain [the decedent] for psychiatric examination due to his odd but relatively trivial, non-criminal behavior, provoked [the decedent] to resist and turned a relatively minor situation into a fatal shooting. No reasonable police officer could have believed that he was entitled to make such an entry.

Id. at 440 (citation omitted) (affirming, on interlocutory appeal, the district court's judgment denying qualified immunity to the individual defendants on the plaintiffs' excessive force claims).

Similarly, *Espinosa v. City of San Francisco*, 598 F.3d 528 (9th Cir. 2010), involved an illegal entry. *Id.* at 533. The Ninth Circuit concluded that the district court "properly denied defendants' summary judgment motion on whether the officers were entitled to qualified immunity for allegedly violating [the decedent]'s Fourth Amendment rights by intentionally or recklessly provoking a confrontation." *Id.* at 538. The Ninth Circuit concluded that, "[v]iewing the evidence in the light most favorable to the plaintiffs, there is evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Id.* at 539 (emphasis added) (citing *Alexander*) ("If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation.").

As discussed above, Deputy Conley violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in searching the shack without a warrant (or applicable warrant exception). Deputies Conley and Pederson violated Mr. and Mrs. Mendez's Fourth Amendment right to be free from an unreasonable search in and in failing to knock-and-announce before the search. As a result, Mr. Mendez picked up the BB gun rifle while sitting up on the futon within the shack, and Deputies Conley and Pederson fired their guns.

Under *Billington*, Deputies Conley and Pederson's predicate constitutional violations "provoked" Mr. Mendez's response, which in turn

resulted in Deputies Conley and Pederson's subsequent use of force.

2. Intentional or Reckless Provocation

Mr. and Mrs. Mendez do not argue that Deputy Conley or, for that matter, Deputy Pederson intentionally provoked the violent response from Mr. Mendez.

With respect to "reckless" provocation, the Ninth Circuit in *Billington* stated, "We read *Alexander*, as limited by [*Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000)], to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." 292 F.3d at 1189 (emphasis added). However, the Ninth Circuit's opinion in *Alexander* does not use the word "reckless" or any derivative thereof. *See* 29 F.3d 1355.

Furthermore, the Ninth Circuit's opinion in *Duran* uses the word "reckless" (and any derivative thereof) only once:

> The Plaintiffs' first argument is that the district court erred when it refused to give an *Alexander* instruction. This instruction is based on the case of [*Alexander*], and applies when there is evidence that a police officer's use of excessive and unreasonable force caused an escalation of events that led to the plaintiff's injury. Here, the Plaintiffs claim that this instruction should have been given because the manner in which the two

> officers approached the Duran residence "virtually assured a police shooting." Specifically, they point to the fact that the officers walked up the driveway with their guns drawn and never announced their presence. The Plaintiffs claim that this "stealth" approach "raised the likelihood" that "whomever they surprised would point a gun at them."
>
> Accordingly, they argue the district court erred when it refused to give the *Alexander* instruction . . . .
>
> Plaintiffs proposed instruction reads as follows: "If you find that [the defendant officer] recklessly, intentionally and/or unreasonably created a situation where the accidental or purposeful use of deadly force upon [the decedent] would become likely, such conduct would be a violation of [the decedent]'s Fourth Amendment right to be free from unreasonable seizures."

221 F.3d at 1130-31 & n.1 (emphasis added). Instead, the Ninth Circuit explained the relevant standard as follows:

> In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting. Here, no such facts exist. The two uniformed officers simply walked up a driveway silently with their guns drawn. Contrary to the Plaintiffs' assertions, nothing about

> these actions should have provoked an armed response. As a result, the district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.

Id. at 1131 (emphasis added).

Returning to the Ninth Circuit's opinion in *Billington*,

> *Alexander*'s requirement that the provocation be either intentional or reckless must be kept within the Fourth Amendment's objective reasonableness standard. The basis of liability for the subsequent use of force is the initial constitutional violation, which must be established under the Fourth Amendment's reasonableness standard. Thus, if a police officer's conduct provokes a violent response, as in *Duran*, but is objectively reasonable under the Fourth Amendment, the officer cannot be held liable for the consequences of that provocation regardless of the officer's subjective intent or motive. But if an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused.
>
> [. . .]
>
> Under *Alexander*, the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. The

> Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. An officer may fail to exercise "reasonable care" as a matter of tort law yet still be a constitutionally "reasonable" officer. Thus, even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.

292 F.3d at 1190 (emphasis added).

Therefore, for purposes of *Billington* provocation, the Ninth Circuit equates "reckless" (and intentional) conduct with conduct that is unreasonable under the Fourth Amendment. In this regard, such "reckless" conduct is distinguished from "bad tactics" and conduct that is merely negligent as a matter of tort law.

For liability to attach under *Billington*, such "reckless" conduct need only be unreasonable under the Fourth Amendment. Specifically, "reckless" conduct for purposes of *Billington* provocation need not be "reckless" as a matter of tort law, so long as it is unreasonable under the Fourth Amendment. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 2 ("A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution

a demonstration of the person's indifference to the risk.").

The Ninth Circuit's opinion in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), confirms this understanding of the rule. In *Glenn*, the police confronted the decedent outside of his home. *Id.* at 867-68. An officer fired several beanbag rounds from a shotgun, which struck the decedent. *Id.* at 869. After the decedent was hit with the beanbag rounds, he began moving toward the house. *Id.* Because the decedent's parents were inside the house (and potentially threatened by the movement), two other officers then fired their semiautomatic weapons, killing the decedent. *Id.*

After quoting the general rule from *Billington* ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."), the Ninth Circuit concluded as follows:

> Because there is a triable issue of whether shooting [the decedent] with the beanbag shotgun was itself excessive force, under *Billington* there is also a question regarding the subsequent use of deadly force. Even assuming, as the district court concluded, that deadly force was a reasonable response to [the decedent's] movement toward the house, a jury could find that the beanbag shots provoked [the decedent's] movement and thereby precipitated the use of lethal force. If jurors conclude that the provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation,

> the officers "may be held liable for [their] otherwise defensive use of deadly force."

Id. at 879 (citing *Billington*) (emphasis added) (reversing the district's ruling on summary judgment that the officers' use of force did not violate the decedent's Fourth Amendment rights).

In *Glenn*, the determinative question under *Billington* clearly was only whether there had been a predicate violation of the Fourth Amendment. Notwithstanding the general rule statement, the Ninth Circuit did not require a separate showing that the officers' conduct was "reckless" as a matter of tort law, or in any way other than under the Fourth Amendment's reasonableness standard.

Consequently, the Court need not conclude that Deputies Conley and Pederson's predicate constitutional violations were "reckless" as a matter of tort law (or otherwise). Under *Billington* and its progeny, it is sufficient that this conduct was unreasonable under the Fourth Amendment and provoked a violent confrontation in which Deputies Conley and Pederson used deadly force.

Defendants argue that "there is no liability under *Alexander* where defendants' conduct was undeserving of a violent response." (Docket No. 242 at 3 (emphasis in original)). But the Ninth Circuit has indicated that the predicate constitutional violation (here, illegal entry) need not be menacing or "provocative" in the sense of inciting a violent response. Rather, for purposes of *Billington/Alexander* provocation, it is sufficient that the predicate constitutional violation "created the need to use force"

(*Billington*) or "created a situation which led to the shooting" (*Espinosa*).

Glenn, 673 F.3d 864, is in accord. In that case, the defendant officers did not act "provocatively" or menacingly or in a way that necessarily "deserved" a violent response. Indeed, the decedent did not react violently. Yet the Ninth Circuit concluded that the theory of *Billington/Alexander* provocation applied based on the (potential) predicate excessive force violation.

Nor is Defendants' reliance on *Duran*, 221 F.3d 1127, persuasive in this regard. In *Duran*, the Ninth Circuit provided the following background:

> At approximately 6:30 a.m., on August 15, 1994, Officer Curiel and Officer William Wallace responded to a dispatch call regarding loud music and shots fired in the vicinity of 52nd and Carmelita Street in the City of Maywood. When the officers arrived at the location, they heard music coming from inside the Duran's garage. The officers pulled out their firearms and silently walked up the driveway toward the source of the music.
>
> As they approached, the officers heard the sound of a person racking a pistol. Immediately upon hearing this sound, Officer Wallace yelled to his partner, "He just racked one." At the same moment, Officer Curiel saw Eloy Duran emerge from behind a pickup truck in the garage holding a weapon. Officer Curiel testified that he shouted in Spanish, "Police, drop the gun,"

> but Duran ignored Officer Curiel's command and pointed his weapon at the officers. Officer Curiel then fired four shots at Duran, causing him to fall to the floor. When Office Curiel approached Duran to disarm him, Duran pointed the gun at him. Officer Curiel stated that he shouted loudly, "Don't, don't, don't." When Duran failed to respond, Officer Curiel fired two more rounds into Duran's chest. At this point, Duran stopped moving and Officer Curiel removed the gun.

Id. at 1129-30 ("In order to justify an *Alexander* instruction, there must be evidence to show that the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting.").

On the *Alexander* issue, the Ninth Circuit stated as follows:

> Contrary to the Plaintiffs' assertions, the officers did not make a "stealth" approach. Officer Curiel testified that he and Officer Wallace arrived at the scene in marked police cars and that both men were wearing police uniforms. They testified further that he and Wallace met on the sidewalk in front of the Duran's residence and walked, side-by-side, up the driveway toward the music in the garage. Although Plaintiffs are correct in pointing out that the officers had their guns drawn and did not announce their presence, these actions were entirely reasonable given that they were responding to a call that shots had been fired.

Id. at 1131 (concluding that the "district court did not abuse its discretion in denying the Plaintiffs' request to give an *Alexander* instruction.").

Arguably, this reasoning could be read to indicate that the district court rightly denied the *Alexander* instruction because the officers' conduct was "undeserving" of a violent—*i.e.*, not menacing or incitingly provocative—and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

However, the Court understands this reasoning to indicate that the district court rightly denied the *Alexander* instruction because there was no evidence of a predicate constitutional violation—*i.e.*, the officers' conduct was reasonable under the Fourth Amendment and therefore not "excessive" or "unreasonable" or "intentional or reckless" under *Alexander*.

Similarly, *Duran* can be distinguished on its facts. For example, in this case, with respect to the shack if not the Hughes residence, Deputies Conley and Pederson arguably did make a "stealth" approach.

Defendants also argue that there was no violent confrontation based on Plaintiffs' own theory of the case (*i.e.*, Mr. Mendez simply was moving the BB run to sit up). Again, *Glenn* suggests otherwise—the decedent in that case did not react violently or in a confrontational manner.

Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's right to be free from excessive force under a theory of *Billington* provocation. The predicate (unreasonable search) constitutional violations render their "otherwise reasonable defensive use of force unreasonable as a matter of law."

The Court recognizes that Deputy Pederson did not technically search the shack, as discussed above. Nevertheless, the Court concludes that Deputy Pederson is liable under *Billington* for two reasons. First, there is no indication in the case law that only the officer who commits the predicate constitutional violation should be held liable for the subsequent use of deadly force. Tellingly, in *Glenn*, one officer shot the decedent with the beanbag rounds (the predicate violation), and two different officers killed the decedent (the subsequent use of deadly force).

Second, as discussed above, Deputy Pederson (as well as Deputy Conley) violated Mr. and Mrs. Mendez's right to be free from an unreasonable search in the absence of a proper knock-and-announce—itself a predicate constitutional violation that directly provoked the violent confrontation and subsequent use of deadly force. If the Deputies had announced themselves, then this tragedy would never have occurred.

Third, even if "reckless" were construed in its traditional tort sense and "undeserved" meant what Defendants contend, the Court's ruling would be the same. As discussed below, the multiple indicia of residency—including being told that someone lived on the property—means that the conduct rose beyond even gross negligence. And it is inevitable that a startling armed intrusion into the bedroom of an innocent third party, with no warrant or notice, will incite an armed response. Any other ruling would be inconsistent with the Second Amendment, as discussed below.

3. Qualified Immunity

Again, the question is whether a reasonable officer could have believed that the conduct of Deputies Conley and Pederson was lawful. As in *Federman* and *Espinosa*, Deputies Conley and Pederson's unreasonable search and manner of entry constituted the predicate, provocative constitutional violation that renders their subsequent use of force unreasonable as a matter of law. For the reasons discussed above, all of Mr. and Mrs. Mendez's rights in this regard were clearly established. Every reasonable officer in Deputies Conley and Pederson's position would have understood that what they were doing violated those rights.

In particular, both during trial and in the briefs following testimony, Deputies Conley and Pederson claim their actions were reasonable because they reasonably did not perceive the shack to be inhabited or, indeed, habitable. Based on the Court's Findings of Fact, their perception was unreasonable. Had this mistake of fact been reasonable, then there would have been no liability.

4. Actual and Proximate Causation

A plaintiff must prove that the defendant's "actions were both the actual and the proximate cause" of the plaintiff's injury. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990); *see Billington*, 292 F.3d at 1190 ("[I]f an officer's provocative actions are objectively unreasonable under the Fourth Amendment, as in *Alexander*, liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused." (emphasis added)).

A defendant's conduct is an actual cause of the plaintiff's injury "only if the injury would not have occurred 'but for' that conduct. *White*, 901 F.2d at 1506 (citation omitted). Mr. and Mrs. Mendez would not have been injured but for Deputies Conley and Pederson's intrusion into the shack. Therefore, the conduct of Deputies Conley and Pederson was an actual cause of Mr. and Mrs. Mendez's injuries.

Furthermore, the "requirement of actual cause is a 'rule of exclusion.' Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury." *Id.* (citation and internal quotation marks omitted). "This question is generally referred to as one of proximate cause." *Id.*

A defendant's conduct is not a proximate cause of the plaintiff's injury "if another cause intervenes and supersedes his liability for the subsequent events." *Id.* (citation omitted). Importantly, whether a plaintiff's own conduct, as an intervening cause of his injury, supersedes the defendant's liability for the results of his own conduct "depends upon what was reasonably foreseeable to [the defendant] at the time." *Id.*

"The courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the defendant's responsibility." *Id.* (citation and internal quotation marks omitted). "Courts look to the original foreseeable risk that the defendant created. When one person's conduct threatens another, the normal efforts of the other . . . to avert the threatened harm are not a superseding cause of harm resulting from such efforts, so as to prevent the

first person from being liable for that harm." *Id.* (citations and internal quotation marks omitted).

Here, Justice Jackson's concurring opinion in *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948), is informative. In *McDonald*, the defendant rented a room in a residence that the landlady operated as a rooming house. *Id.* at 452. The defendant had been under police surveillance based on suspicion that he was running a "numbers game." *Id.* On the day of the defendant's arrest three police officers surrounded the house during the midafternoon. The officers did not have a warrant for arrest nor a search warrant. One of the officers thought that he heard an adding machine, which frequently was used in numbers games. *Id.* Believing that the numbers game was in process, one of the officers opened a window leading into the landlady's room and climbed through. *Id.* at 452-53. He identified himself and then let the other officers into the house. *Id.* at 453. The officers arrested the defendant in an end bedroom on the second floor. *Id.*

According to Justice Jackson,

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.
>
> . . . the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than

> to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

Id. at 460-61 (Jackson, J., concurring).

As Justice Jackson foretold, a foreseeable risk of an unreasonable search is that the offending officers will be threatened by the resident. Indeed, this is one of the bases for the knock-and-announce rule. *See United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005) ("protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.").

In this case, it was foreseeable that opening the door to the shack without a warrant (or warrant exception) and without knocking-and-announcing could lead to a violent confrontation. Mr. Mendez's "normal efforts" in picking up the BB gun rifle to sit up on the futon do not supersede Deputies Conley and Pederson's responsibility. Therefore, the conduct

of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries.

This conclusion is consistent with the tenet that the "Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("[T]he need for defense of self, family, and property is most acute" in the home). Americans own firearms for many reasons, including hunting, sport and collecting, but one of the main reasons is to protect their own homes. A startling entry into a bedroom will result in tragedy.

E. Liability

1. Personal Liability

An officer only can be held liable for his or her "'integral participation' in the unlawful conduct." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (Section 1983 does not "allow group liability in and of itself without individual participation in the unlawful conduct").

However, "'integral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004); *see also Hernandez v. City of Napa*, No. C-09-02782 EDL, 2010 WL 4010030, at *11 (N.D. Cal. Oct. 13, 2010) (the "integral participant" rule "extends liability to those actors who were integral participants in the constitutional

violation, even if they did not directly engage in the unconstitutional conduct themselves").

Moreover, in a situation where "each defendant might have committed an act that is a tort when injury results (for there is no tort without an injury), but it is unclear which defendant's act was the one that inflicted the injury—both shot at the plaintiff, one missed, but we do not know which one missed. . . . both are jointly and severally liable." *Richman v. Sheahan*, 512 F.3d 876, 884 (7th Cir. 2008) (citing *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948)) (discussing liability for excessive force under the Fourth Amendment).

Here, Deputy Conley is liable for unreasonably searching the shack without a warrant or applicable warrant exception. Deputies Conley and Pederson are jointly and severally liable for unreasonably failing to knock-and-announce their presence.

On the provocation claim, there is no evidence as to which bullet(s) caused each injury. Deputies Conley and Pederson are jointly and severally liable for unreasonable, excessive force under a theory of *Billington* provocation.

2. Vicarious Liability

"A municipality or other local government may be liable under [Section 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation. But, under § 1983, local governments are responsible only for 'their own illegal acts.' They are not vicariously liable under § 1983 for their

employees' actions." *Connick v. Thompson*, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011) (citations omitted).

In this case, there is no direct claim for liability under Section 1983 against COLA. Nor can COLA be held vicariously liable under Section 1983 for the wrongful conduct of Deputies Conley and Pederson. This formal lack of liability is not meant to undermine the legal obligation of COLA to pay the forthcoming judgment.

F. Damages

The "basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (citations omitted).

"[N]o compensatory damages may be awarded in a § 1983 suit absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (citation omitted). However, the "law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right, without a privilege or immunity, even if the plaintiff suffered no actual damage." *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993).

In awarding non-economic damages, the Court awarded an amount for Mr. Mendez that is sufficient—

if invested prudently and not squandered—to raise his family in dignified circumstances. The gist of Mr. Mendez's testimony was that the loss of his leg caused a loss of dignity and self-sufficiency. In awarding non-economic damages to Mrs. Mendez, the Court is mindful that she was pregnant at the time she was shot.

G. State Law Claims

As noted above, Mr. and Mrs. Mendez also allege various tort claims under California law.

1. Assault and Battery

Under California law, battery claims for excessive force by a law enforcement official are governed by the same reasonableness standard of the Fourth Amendment. *See Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-74, 74 Cal. Rptr. 2d 614 (1998) ("By definition then, a *prima facie* battery is not established unless and until plaintiff proves unreasonable force was used."); *see also* CACI 1305, Battery by Peace Officer; *Evans v. City of San Diego*, —F. Supp. 2d—, 2012 WL 6625286, at *9 (S.D. Cal. Dec. 19, 2012) ("Plaintiff's [claim] for assault and battery flows from the same facts as her Fourth Amendment excessive force claim, and is measured by the same reasonableness standard of the Fourth Amendment.").

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for assault and battery fails. In addition, the Court notes that there appears to be no basis under California law to apply a theory

of *Billington* provocation to an assault and battery claim.

2. Negligence

Likewise, under California law "negligence is measured by the same standard as battery and excessive use of force under the Fourt[h] Amendment." *Morales v. City of Delano*, 852 F. Supp. 2d 1253, 1278 (E.D. Cal. 2012); *McCloskey v. Courtnier*, No. C 05-4641 MMC, 2012 WL 646219, at *3 (N.D. Cal. Feb. 28, 2012) (same) (citing cases).

For the reasons discussed above, Deputies Conley and Pederson's use of force, at the moment of shooting, was objectively reasonable. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails—in this respect.

However, whether California law recognizes an analogue to *Billington* provocation under a theory of negligence is an open question. Importantly, in *Hayes v. County of San Diego*, 658 F.3d 867 (9th Cir. 2011), the Ninth Circuit certified to the California Supreme Court a question relating to "deputies' preshooting conduct in the context of the claim to negligent wrongful death." *Id.* at 869 ("[W]e request that the California Supreme Court answer the following question: Whether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him.").

For example, in *Hayes* the Ninth Circuit discussed the California Supreme Court's decision in *Hernandez v. City of Pomona*, 46 Cal.4th 501, 94 Cal. Rptr. 3d 1 (2009):

In *Hernandez*, the court granted review to consider the following question: "When a federal court enters judgment in favor of the defendants in a civil rights claim brought under 42 United States Code section 1983 . . ., in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action?" The court held "that on the record and conceded facts here, the federal judgment collaterally estops plaintiffs from pursuing their wrongful death claim, even on the theory that the officers' preshooting conduct was negligent."

In doing so, the California Supreme Court did not hold that law enforcement officers owed no duty of care in regards to pre-shooting conduct, as the [California] lower courts . . . had. Instead, the court found that the officers' specific preshooting conduct did not breach applicable standards of care. In light of this conclusion, the court in *Hernandez* declined to address the officers' claim that "they owed no duty of care regarding their preshooting conduct."

The court's extended analysis of whether the officers' preshooting conduct breached the relevant standard of care indicated, however, that it would likely not adopt the broad rule from [the California lower courts]

> that officers owe no such duty. Indeed, in a concurring opinion, Justice Moreno argued that the court should not have reached the issue "because plaintiffs are entitled to amend their complaint to allege preshooting negligence." The majority responded, stating "we find that plaintiffs have adequately shown how they would amend their complaint to allege a preshooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability."
>
> There is disagreement within this court as to whether this discussion in *Hernandez* suggests that the California Supreme Court would not follow the holdings in [the California lower courts] . . . .

Id. at 872 (citations omitted).

In the absence of clear direction from the California Supreme Court, the Court concludes that California law does not provide for an analogue to *Billington* provocation under a theory of negligence. Furthermore, the Court believes that the answer to the certified question in *Hayes* is unlikely to resolve this question as it would bear on this case. Accordingly, Mr. and Mrs. Mendez's claim for negligence fails.

However, after the California Supreme Court decides the certified question in *Hayes*, this Court will review that decision. As appropriate, and on its own motion, the Court will alter or amend the judgment in this case pursuant to Rule 59(e).

3. Intentional Infliction of Emotional Distress ("IIED")

Under California law, the "elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendants with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Campos v. City of Merced*, 709 F. Supp. 2d 944, 965 (E.D. Cal. 2010) (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550 (1993) (citation omitted). "For conduct to be extreme and outrageous, it must be 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" *Id.* at 965-66(citing *Potter*, 6 Cal. 4th at 1001).

"In order to establish the second element, a plaintiff must show the conduct was especially calculated to cause severe mental distress." *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1126 (C.D. Cal. 2007) (citing *Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661 (1985)); *Ochoa*, 39 Cal. 3d at 165 n.5 (Under California law, "the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind" (emphasis in original)).

Although the totality of Deputies Conley and Pederson's conduct was reckless as a matter of tort law, there is no evidence that their conduct was calculated to cause mental distress, and the actual

decision to shoot was, by itself, justified. Mr. and Mrs. Mendez's IIED claim fails.

III. VERDICT

In favor of Plaintiffs Mr. and Mrs. Mendez and against Defendants Deputies Conley and Pederson.

On the Fourth Amendment unreasonable search claim (based on warrantless entry, the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, only Deputy Conley is liable on this claim.

On the Fourth Amendment unreasonable search claim (based on failure to knock-and-announce), the Court awards Mr. and Mrs. Mendez $1.00 in nominal damages. As discussed above, Deputies Conley and Pederson are jointly and severally liable on this claim.

On the Fourth Amendment excessive force claim (based on conduct at the moment of shooting), the Court rules in favor of Deputies Conley and Pederson.

On the Fourth Amendment excessive force claim (based on *Alexander/Billington* provocation), as discussed above, Deputies Conley and Pederson are jointly and severally liable. On this claim, the Court awards the following damages:

Plaintiff Angel Mendez

Past Medical Bills:	$721,056
Future Medical Care:	
Prosthesis upkeep and replacement:	$407,000
Future surgeries:	$45,000

Psychological care (5 years):	$13,300
Attendant Care (4 hours/day at $12.00/hour)	$648,240
Loss of Earnings:	$241,920
Non-Economic Damages:	$1,800,000
Total:	$3,876,516
Plaintiff Jennifer Lynn Garcia	
Past Medical Bills:	$95,182
Future Medical Care:	$37,000
Non-Economic Damages:	$90,000
Total:	$222,182

On the California tort claims, the Court finds in favor of Deputies Conley and Pederson.

The Court will enter a separate judgment pursuant to Federal Rule of Civil Procedure 54 and 58(b).

/s/ Michael W. Fitzgerald
United States District Court
Judge

Dated: August 13, 2013

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (JUNE 23, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ and
JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES and COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy
and JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686, 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

Appellants' Petition for Panel Rehearing is DENIED. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petition for Rehearing En Banc is DENIED.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

ORDER OF THE NINTH CIRCUIT (APRIL 22, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES and COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy and JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellees.

No. 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

Plaintiffs-Appellees are ordered to file a response to Defendants-Appellants' Petition for Panel Rehearing or Rehearing En Banc. The response is not to exceed 20 pages, and must be filed no later than 21 days from the date of this order.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

ORDER OF THE NINTH CIRCUIT (MARCH 15, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellants.

No. 13-56686

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT,

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants-Appellees.

No. 13-57072

D.C. No. 2:11-cv-04771-MWF-PJW
Central District of California, Los Angeles

Before: GOULD and BERZON, Circuit Judges, and STEEH,* Senior District Judge.

Defendants-Appellants' Motion For 30-Day Extension of Time to File Petition For Rehearing By Panel and/or En Banc and Stay of Mandate is GRANTED.

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* The Honorable George Caram Steeh III, Senior District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 24 2016
OFFICE OF THE CLERK

No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CHRISTOPHER CONLEY AND JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Deputies Christopher Conley and Jennifer Pederson shot Respondents Angel and Jennifer Mendez repeatedly after entering their home without a warrant. The Ninth Circuit below not only affirmed the district court's ruling that the officers violated clearly established Fourth Amendment law when they entered Respondents' home, it concluded that whether the officers were "plainly incompetent" was "quite debatable." App. 10a. Unlike many cases involving police shootings, Respondents had not committed a crime and were not suspected of doing so: they were simply lying on a futon in the wooden shack in which they resided. Yet as a direct result of Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, and Mrs. Mendez was shot in the back. The questions presented are:

1. Whether the Ninth Circuit's proximate cause analysis conflicts with decisions of this Court or other circuits.

2. Whether the Ninth Circuit correctly affirmed the district court's finding that the deputies' unlawful conduct proximately caused Petitioners' injuries.

3. Whether the Ninth Circuit correctly held that Petitioners are not entitled to qualified immunity.

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STATEMENT OF THE CASE

1. The events leading to Respondents' injuries began on October 1, 2010, when Deputies Conley and Pederson met with several other police officers to organize a search for a "parolee-at-large" named Ronnie O'Dell. According to a confidential informant, "a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes." App. 58a ¶ 19. The officers proceeded to the Hughes residence. Acting without a warrant, the officers searched the residence, but did not find O'Dell.

Still acting without a search warrant, Deputy Pederson decided to "go ahead and clear the backyard." App. 5a. During the briefing that preceded the search of the Hughes residence, the officers were told that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)." App. 59a ¶ 25.[1] Mr. Mendez was a high school friend of Hughes, and she had allowed him to construct and live in a shack in her backyard. Pederson admitted that she heard that announcement. App. 59a ¶ 26.

Knowing that Mr. and Mrs. Mendez lived in the shack behind the Hughes residence, Pederson

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[1] Consistent with the district court decision, this Brief In Opposition refers to Respondent Jennifer Lynn Garcia as "Mrs. Mendez" since she and Mr. Mendez "were living together as a couple when the shooting occurred and thereafter married." App. 56a ¶ 1.

proceeded through the backyard to search the shack. She was joined by Deputy Conley, who was also present during the earlier briefing. Pederson and Conley "did not knock and announce their presence at the shack," and Conley "did not feel threatened." App. 66a ¶¶ 98, 104. With their guns drawn, Conley opened the door to the shack and pulled back the blanket used as insulation. Just as the officers had been told at the earlier briefing, Mr. and Mrs. Mendez were inside.

Mr. Mendez kept a BB gun in the shack to shoot rats, mice, and other pests. When the door opened, Mr. Mendez moved the BB gun so that he could sit up. When Conley saw the BB gun, he yelled "gun!" and the two officers then fired *fifteen* shots at Respondents. Mrs. Mendez was shot in the back, and Mr. Mendez was shot in the right arm, right shin, right hip, lower back, and left foot. Mr. Mendez's right leg was subsequently amputated below the knee.

2. Respondents sued Pederson and Conley under § 1983, alleging a violation of their Fourth Amendment rights. Relevant here, the district court found, after a bench trial, that the officers' actions were not justified by any exception to the warrant requirement and that the officers were not entitled to qualified immunity. ER 88a-99a. The court awarded roughly $4 million in damages, including over $816,000 for past medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez.

3. Petitioners appealed, and a unanimous Ninth Circuit panel affirmed. Addressing the deputies' reasons for searching the Hughes property, the Ninth Circuit noted: "Although the question is quite debatable, we will assume without deciding that the officers were not 'plainly incompetent.'" App. 10a. As "just one consideration," the Ninth Circuit explained that "[u]nless [O'Dell] was riding in circles, he would have passed the house before the officers arrived." App. 11a n.5. Additionally, "the deputies lacked any credible information that [O'Dell] was in Plaintiffs' shack." App. 14a. Indeed, Conley admitted in the district court that he "didn't have a specific belief that [O'Dell] was in fact in there." App. 37a (quoting testimony).

Based on the district court's detailed findings – and recognizing that all facts must be construed "in the light most favorable to the factfinder's verdict and the non-moving parties" (App. 7a) – the Ninth Circuit concluded that Petitioners had unlawfully searched Respondent's residence "in an attempt to execute an arrest warrant for a parolee that, at most, may have been on the property," which the court held was "contrary to" *Steagald v. United States*, 451 U.S. 204 (1981), *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and *United States v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001). App. 24a (emphasis in original). The Ninth Circuit ultimately agreed with the district court that "the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant." App. 18a.

Turning to proximate causation, the Ninth Circuit again upheld the district court's analysis. Applying a "provocation" analysis, the Ninth Circuit agreed with the district court that "because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper." App. 22a. The Ninth Circuit further held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Having so held. the Ninth Circuit affirmed the district court's judgment in favor of Respondents. App. 26a.

4. Petitioners thereafter filed a timely Petition For Rehearing En Banc, which the Ninth Circuit denied. App. 137a-138a. According to the Ninth Circuit's Order, "[t]he full court has been advised of the Petition For Rehearing En Banc and no judge of the court has requested a vote." App. 138a. Petitioners now ask this Court to review the same arguments that the Ninth Circuit unanimously rejected.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S PROVOCATION ANALYSIS DOES NOT WARRANT THIS COURT'S REVIEW.

A. The Ninth Circuit Has Expressly Limited Its Provocation Analysis Such That Plaintiffs Must Establish The Traditional Elements Of A Section 1983 Claim, Including Proximate Cause.

The Ninth Circuit first articulated a so-called "provocation doctrine" in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In *Alexander*, police officers shot and killed a mentally ill man who had threatened to shoot the officers if they entered his house and had attempted to shoot the officers after they broke down his door. *Id.* at 1358. The Ninth Circuit held that the police could be liable for shooting the man because they "used excessive force in creating the situation which caused [the man] to take the actions he did." *Id.* at 1366. As the Ninth Circuit below noted, this analysis is sometimes referred to as the "provocation doctrine." App. 22a.

But while the Ninth Circuit has continued to refer to the analysis in *Alexander* as the "provocation doctrine," it *substantially* limited the role and effect of that rubric in *Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000). The plaintiff in *Duran* argued that the district court should have instructed the jury that, under *Alexander*, the defendant police officers could violate the Fourth Amendment merely by

provoking the use of deadly force. *Id.* at 1130-31. The Ninth Circuit rejected the argument and clarified that "there must be evidence to show [1] that the officer's actions were *excessive and unreasonable*, and [2] that these actions caused an escalation that led to the shooting." *Id.* at 1131 (emphasis added). Because there was no such evidence in *Duran*, the Ninth Circuit upheld the jury's defense verdict. *Id.*

Two years later, in *Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002), the Ninth Circuit expressly recognized that it had "placed important limitations on *Alexander*." The court "read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, *if the provocation is an independent Fourth Amendment violation*, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1189 (emphasis added). The court then turned to damages and explained that if a plaintiff can establish an independent Fourth Amendment violation, then "liability is established, and the question becomes the scope of liability, or what harms the constitutional violation *proximately caused*." *Id.* at 1190 (emphasis added). In short, following *Billington*, what remains are two issues: (1) whether the defendant violated the plaintiff's constitutional rights; and (2) what harms were proximately caused by that violation. These, of course, are the same *basic issues* that courts decide in all cases alleging constitutional torts.

The Ninth Circuit below applied these legal principles and adhered to the same requirements. Starting with the independent Fourth Amendment

violation required by *Billington*, the Ninth Circuit affirmed the district court's holding that "the officers violated the Fourth Amendment by searching the shack without a warrant." App. 22a. Significant here, Petitioners *do not challenge* that holding. The Ninth Circuit then turned to the proximate cause analysis – also required by *Billington* – and affirmed the district court's holding that the officers' unconstitutional conduct "proximately caused the plaintiffs' injuries." *Id.* Having analyzed both whether there was an independent constitutional violation and whether that violation proximately caused Plaintiffs' injuries, the Ninth Circuit agreed with the district court that "liability was proper" and affirmed. *Id.*

B. The Ninth Circuit's Provocation Analysis Does Not Conflict With Decisions Of This Court.

Contrary to Petitioners' argument (Pet. 16-18), the Ninth Circuit's provocation analysis does not conflict with this Court's precedent. In *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015) (hereinafter "*Sheehan*"), the Court stated that its citation to *Alexander* and *Billington* did not suggest agreement or disagreement with those cases. Significant here, the Court did not identify any conflict between those cases and its own precedent. Nor is that surprising, as the Ninth Circuit emphasized in *Billington* that the provocation analysis "must be kept within the Fourth Amendment's reasonableness standard" as set forth in *Graham v. Connor*, 490 U.S. 386, 395 (1989), and "must be read consistently with the Supreme Court's

admonition in *Graham*" that courts must judge reasonableness "from the perspective of a reasonable officer." *Billington*, 292 F.3d at 1190 & n.73 (footnote and internal quotation marks omitted). The Ninth Circuit, in other words, appears to have recognized that the provocation analysis as set forth in *Alexander* could potentially sweep too broadly and has therefore emphasized that the doctrine must be applied consistently with *Graham*. If there was a conflict with this Court's precedent in 1994 when the Ninth Circuit first articulated the provocation analysis, it was eliminated in 2002 when the Ninth Circuit issued its opinion in *Billington*.

Ignoring the Ninth Circuit's clear admonition in *Billington* that the provocation analysis must be applied consistently with *Graham*, Petitioners nevertheless claim that the Ninth Circuit's analysis "contravenes *Graham*" because it purportedly holds police officers "civilly responsible for a *reasonable* use of force." Pet. 16 (emphasis in original). A critical flaw in this argument is that the Ninth Circuit did not find liability on an excessive force claim. App. 6a. Nor is Petitioners' use of force the "independent Fourth Amendment violation" required by *Billington*. Instead, as the Ninth Circuit explained, the basis for liability was the district court's finding that "the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries." App. 22a. *Graham* does not address unlawful entry claims, which is the sole claim at issue here.

The Ninth Circuit below also did not apply *Graham* to Respondents' unlawful entry claim. App. 22a-24a. Instead, it relied principally on (1) *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), which holds that a warrantless entry into a home to conduct a search is unreasonable "[a]bsent exigent circumstances," (2) *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984), which holds that the state's hot pursuit argument was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime," and (3) *United States v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001), which forbids "warrantless searches while investigating a suspect's whereabouts." App. 24a. Those cases, unlike *Graham*, address whether and when police can conduct warrantless searches, which is the basis for liability here. App. 22a.

Moreover, nothing in *Graham* precludes lower courts from considering all of the facts and circumstances in deciding Fourth Amendment claims. To the contrary, the Court emphasized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" and that "its proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). Quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), the Court reiterated that the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure." *Graham*, 490 U.S. at 396. The Court thus required lower courts to carefully consider *all* of the relevant facts and circumstances and *did not hold* that any facts

or circumstances should be ignored in deciding Fourth Amendment claims. Indeed, as discussed in Section I.C below, several lower courts have expressly noted that any such limitation would be inconsistent with the "totality of the circumstances" approach inherent in the Court's reasonableness standard for Fourth Amendment claims.

The Ninth Circuit's analysis of the proximate cause issue – as required by *Billington* and in accordance with basic principles of tort law (the underlying principles are the same) – also does not conflict with this Court's precedent. As the Ninth Circuit noted, this Court has expressly held that § 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" App. 24a (quoting *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986), and *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). Quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014), the Ninth Circuit added that "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." App. 24a; *see also Carey v. Piphus*, 435 U.S. 247, 254 (1978) ("the basic purpose of a § 1983 damages award should be to compensate persons for injuries *caused by* the deprivation of constitutional rights" (emphasis added)). Here too, there is no conflict between the Ninth Circuit's analysis and this Court's precedent.

What remains is a factual issue. Mr. Mendez testified at trial that he had just fallen asleep before he heard "the door come open on the shed," which caused him to "come out of bed and ... lift the gun off the bed" "*in reaction* to the door coming open." Dkt. 246 at 6:9-17, 7:9-15, 8:3-7, 9:18-20 (emphasis added). When asked if he "would describe [his] movement in getting out of the bed as a fast one," Mr. Mendez replied. "Yes, because I was startled." *Id.* at 13:2-4. After hearing this testimony and the testimony of the officers, the district court found that when the officers opened the door to his residence, Mr. Mendez moved his BB gun "so that he could put his feet on the floor of the shack and sit up" and that this movement caused Pederson and Conley to fire their weapons. App. 68a-69a ¶¶ 119, 127. This evidence amply supports the district court's ruling that "the conduct of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries." App. 126a-127a. To set aside this finding, Petitioners must establish – and the Court must find – that it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Petitioners do not even attempt to make that showing. Even if they had, that is hardly the sort of issue that warrants this Court's review.

C. The Provocation Analysis Also Does Not Conflict With Decisions Of Other Circuits.

The Ninth Circuit's provocation analysis also does not conflict with decisions in other circuits. Contrary to Petitioners' argument (Pet. 18-19), Justice (then Circuit Judge) Alito's opinion in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), provides strong support for the Ninth Circuit's analysis below. In *Bodine*, the Third Circuit made clear that an officer's liability for unlawful conduct is to be determined by "basic principles of tort law." *Id.* at 400. As a result, police officers who illegally enter a suspect's home "would not be liable for harm produced by a 'superseding cause.'" *Id.* Conversely, "the troopers would be liable for the harm 'proximately' or 'legally' caused by their tortious conduct." *Id.* (emphasis added). The Ninth Circuit's provocation analysis, as discussed in Section I.A above, is no different in that respect: it holds police officers liable for harm that is proximately caused by their unlawful conduct.

The Third Circuit in *Bodine* also provided a hypothetical, instructive here, where there is both an illegal entry claim and an excessive force claim. The court held that if the jury were to determine "that the troopers' entry was unlawful, it will be necessary to determine how much of the injury suffered by Bodine was proximately or legally caused by the illegal entry." 72 F.3d at 400. The court also recognized that while the illegal entry and excessive force claims are separate, "[t]he harm proximately caused by these two torts may overlap." *Id.* at 400-01. Regardless of any such

overlap, the police officers are liable for whatever harm was proximately caused by their unlawful conduct. That is precisely what the lower courts held in this case: "the officers violated the Fourth Amendment by searching the shack without a warrant" and that conduct "proximately caused the plaintiffs' injuries." App. 22a.

Other circuits agree. In *Pauly v. White*, 814 F.3d 1060, 1072 (10th Cir. 2016), the Tenth Circuit specifically addressed "pre-seizure conduct and proximate cause" and concluded – like the Third Circuit in *Bodine* and the Ninth Circuit below – that "Officers Mariscal and Truesdale may be held liable if their conduct immediately preceding the shooting was the but-for cause of Samuel Pauly's death, and if Samuel Pauly's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability." In *Attocknie v. Smith*, 798 F.3d 1252 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2008 (2016), the court likewise held that "because a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron, we need not decide whether Cherry used excessive force when he confronted Aaron." *Id.* at 1258 (internal citation omitted). Other courts have likewise held that § 1983 claims are governed by basic principles of tort law, including proximate cause.[2] Indeed, Respondents

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[2] *See, e.g.*, *Raub v. Campbell*, 785 F.3d 876, 881 n.6 (4th Cir.) ("Section 1983 imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury") (internal quotation marks omitted), *cert. denied*, 136

(continued . . .)

are not aware of – and Petitioners have not cited – a § 1983 case that *rejects* those legal principles, which, as noted above, apply in all cases alleging constitutional torts.

Rather than focus on the independent Fourth Amendment violation at issue and the Ninth Circuit's proximate cause analysis, Petitioners raise a wholly distinct issue: the "segmented

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(. . . continued)
S. Ct. 503 (2015); *Drumgold v. Callahan*, 707 F.3d 28, 48 (1st Cir. 2013) ("As a general rule, we employ common law tort principles when conducting inquiries into causation under § 1983." (internal quotation marks omitted)); *Hayden v. Nevada Cty., AR*, 664 F.3d 770, 773 (8th Cir. 2012) (plaintiff "must present evidence from which a reasonable jury could conclude that [Mormon's] statements were the proximate cause of the violation of his constitutional right"); *Burns v. PA Dep't of Corr.*, 642 F.3d 163, 181 (3d Cir. 2011) ("the plaintiff in a § 1983 case must prove that a constitutional violation has occurred, and that it was the proximate cause of his or her injuries"); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) ("Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim."); *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002) ("ordinary rules of tort causation apply to constitutional tort suits"); *Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th Cir. 2000) ("§ 1983 defendants are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions"); *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) ("award of damages must always be designed to *compensate injuries* caused by the [constitutional] deprivation") (emphasis and alteration in original, internal quotation marks omitted); *Whirl v. Kern*, 407 F.2d 781, 789 (5th Cir. 1968) (§ 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

approach" to excessive force claims. As Petitioners note, some courts have held that excessive force claims should be viewed in "segments" and that courts should disregard earlier segments when determining whether an officer used excessive force in a later segment (Pet. 18-22) while other courts have held that "[t]he reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 1657 (2016). Courts have emphasized that this latter approach "is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *Garner*, 471 U.S. at 8-9). Numerous other courts have adopted this approach.[3]

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[3] *See, e.g., Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) ("[t]his approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard," quoting *Garner*, 471 U.S. at 8-9); *Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (finding fact issues regarding an excessive force claim based on evidence that the officer caused the conduct (the suspect "turn[ed] reflexively down and away from the breaking window" and thereby appeared to be "reaching for a weapon") that arguably permitted the use of deadly force); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer cannot lawfully use deadly force to protect

(continued . . .)

Respondents recognize, of course, that the Court stated in *Sheehan* that "[t]he Ninth Circuit's 'provocation' rule ... has been sharply questioned elsewhere." 135 S. Ct. at 1776 n.4 (citing *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000), and *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007)). But the cases cited in *Sheehan* do not undermine the Ninth Circuit's analysis here. Starting with *Hector*, the court there did not cite *Alexander* nor did it discuss the Ninth Circuit's provocation analysis. The opinion also predates *Billington*, which "placed important limitations on *Alexander*." 292 F.3d at 1188. Substantively, the court in *Hector* followed *Bodine* (discussed *supra* at 12-13) and similarly held that § 1983 actions for Fourth Amendment violations are governed by basic principles of proximate causation, including "the concept of intervening causes." 235 F.3d at 160. The Ninth Circuit, as noted *supra* at 10-11, correctly recognized and applied those legal principles.

In *Livermore*, in contrast, the Sixth Circuit expressly questioned the Ninth Circuit's analysis in *Billington* (476 F.3d at 406), but whether there is a conflict between the two circuits is not clear. In *Livermore*, the court held that "[t]he proper approach under Sixth Circuit precedent is to view

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(. . . continued)
himself if he "unreasonably created the encounter that ostensibly permitted the use of deadly force"); *Sigley v. City of Parma Heights*, 437 F.3d 527, 534–35 (6th Cir. 2006) (citing *Starks* with approval and recognizing, as in *Starks*, that "determining whether the officer placed himself in danger is a factual inquiry that should be resolved by the factfinder").

excessive force claims in segments" and "disregard" events in earlier segments when determining whether an officer used excessive force in a later segment. *Id.* at 406-07. But the Sixth Circuit subsequently held in *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive." That is the more recent and better reasoned approach, and numerous courts have similarly so held. *See supra* at 15-16 & n.3. Over time, the Circuits can be expected to reach consensus on that point, and the Court should allow that process to continue.

In the meantime, this case does not require the Court to choose between a "segmented" approach, on the one hand, and a "totality of the circumstances" approach, on the other, because the Ninth Circuit did not find liability on an excessive force claim. App. 22a. As a result, the Ninth Circuit never addressed whether it is appropriate or inappropriate to consider events in earlier segments when determining whether Conley and Pederson used excessive force after they entered Respondents' residence. The dispositive issue in this case was not whether Respondents should prevail on an excessive force claim, but rather what damages were *proximately caused* by the deputies' illegal entry into Respondents' residence. The only case cited by Petitioners that addresses that issue is *Pauly* (Pet 29-30), which provides strong support for the Ninth Circuit's causation analysis. *See supra* at 13 and *infra* at 21. The other cases cited by Petitioners did not address that issue, nor did they abandon basic principles of tort law in

determining what damages are proximately caused by an officer's independent Fourth Amendment violation. The Ninth Circuit properly applied those legal principles, and its ruling does not conflict with decisions of other circuits.

D. Contrary to Petitioners' Argument, The Ninth Circuit's Provocation Analysis – As Applied In This Case – Protects Both Police Officers And Innocent Individuals Like Respondents.

Petitioners conclude their discussion of the Ninth Circuit's provocation analysis by claiming that the analysis "puts the lives of officers at risk." Pet. 23. But in so arguing, Petitioners continue to misapprehend the Ninth Circuit's analysis in this case. As the Ninth Circuit explained, the independent Fourth Amendment violation at issue in this case is the unlawful entry into Respondents' home. App. 18a ("the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant"); App. 22a ("the officers violated the Fourth Amendment by searching the shack without a warrant"). If officers recognize – as this Court has held – that "the Fourth Amendment has drawn a firm line at the entrance to the house" (*Steagald*, 451 U.S. at 212 (internal quotations marks omitted)), they are far less likely to enter a home to conduct a warrantless search (as Petitioners did here).

Such a result *protects* officers. The Court has long recognized the constitutional right to use arms to protect a home. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court stated:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.*

Id. at 628 (emphasis added). The Ninth Circuit below recognized this risk as well (App. 24a-25a), as did the Tenth Circuit in *Pauly* (814 F.3d at 1072-73). Far from putting the lives of officers at risk, the Ninth Circuit's analysis protects police officers from the consequences of rushing into a person's home without a warrant, without exigent circumstances, and without probable cause – as happened here.

Finally, enforcement of Fourth Amendment rights also respects the search warrant process, the purpose of which "is to allow a neutral judicial officer to assess whether the police have probable cause to ... conduct a search." *Steagald*, 451 U.S. at 212. This important constitutional checkpoint acknowledges that officers are "engaged in the often competitive process of ferreting out crime" and "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." *Id.* This, too, is a strong reason to deny the Petition.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENTS CAN ALSO RECOVER DAMAGES UNDER "BASIC NOTIONS OF PROXIMATE CAUSE."

In addition to finding liability under the provocation doctrine, the Ninth Circuit below held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Petitioners argue that this holding is legally incorrect and raises "a substantial issue for this Court to answer." Pet. 33-34.

The cases cited by Petitioners (Pet. 34-35) do not support their argument. As noted previously, the Third Circuit in *Bodine* recognized that unlawful entry claims, like other § 1983 claims for violations of constitutional rights, are governed by "basic principles of tort law." 72 F.3d at 400; *see also supra* at 12-13. As a result, the plaintiff must establish that the officers' unlawful conduct proximately caused harm and the officers "would not be liable for harm produced by a superseding cause." 72 F.3d at 400 (internal quotation marks omitted). These are intensely factual issues, which is why the Third Circuit in *Bodine* remanded the matter for a new trial and did not decide the proximate cause and superseding cause issues as a matter of law. *Id.* at 401. The Third Circuit did not, as Petitioners urge here, find superseding cause as a matter of law. Indeed, such a holding would allow police officers to unlawfully enter a home, shoot a resident who understandably responds in a "threatening" manner, and then

avoid liability *in all cases* based on superseding cause principles. Such a rule would undermine "the very core of the Fourth Amendment," which is the right to "retreat into [one's] own home and there be free from unreasonable governmental intrusion." *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (alterations and citation omitted).

The other cases cited by Petitioners confirm that this issue turns on the facts of each case. In *Kane v. Lewis*, 604 Fed. Appx. 229, 237 (4th Cir. 2015), the victim of the police shooting knew that the men who entered the apartment were police officers "yet advanced toward them with a knife." In *James v. Chavez*, 511 Fed. Appx. 742, 750 (10th Cir. 2013), the victim of the police shooting knew that police were at his door and yet deliberately attempted "to stab a police officer." In *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011), the victim was both "noncompliant" and "threatening." In *Estate of Sowards v. City of Trenton*, 125 Fed. Appx. 31, 41 (6th Cir. 2005), the victim knew that police officers were kicking down his door and yet threatened the officers with a handgun when they gained access. In *Pauly*, in contrast, the court found fact issues regarding the superseding cause analysis because it was unclear whether the officers properly identified themselves and whether the victims of the police shooting believed the officers were intruders rather than state police. 814 F.3d at 1074. The rule that emerges from these cases is that *knowingly* and *intentionally*

attacking a police officer can be an intervening act that supersedes the liability of the officer.[4]

Here, in contrast, there is no evidence to support such a defense. Petitioners, for their part, "violated the Fourth Amendment by searching the shack without a warrant" (App. 22a), and they do not argue otherwise. The record also establishes that they "did not knock and announce their presence at the shack." App. 66a ¶ 98.[5] Respondents, in turn, did not knowingly or deliberately attack the officers, and Petitioners again make no such argument. Instead, as the district court found, Mr. Mendez "thought it was Ms. Hughes" opening the door and "picked up the BB gun rifle to put it on the floor" so that he could sit up. App. 68a ¶¶ 118-19. This conduct – along

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[4] Petitioners also cite *Hector* (Pet. 35), but the plaintiff in that case alleged an unlawful search and seizure claim and not an unlawful entry claim, the court noted that the police officers "are not alleging that any of Hector's conduct counts as an intervening cause," and the court ultimately declined to reach the intervening cause issue. 235 F.3d at 160-61.

[5] Petitioners claim that they "bear no responsibility for failing to identify themselves before opening the door to the shed" because the Ninth Circuit concluded that they are entitled to qualified immunity on the knock and announce claim. Pet. 30. Here again, Petitioners misapprehend the Ninth Circuit's ruling: the failure to knock and announce is not a separate basis for liability but rather one of the facts and circumstances that properly informs the lower courts' proximate cause analysis. App. 25a ("the situation in this case, where Mendez was holding a gun when the officers barged into the shack *unannounced*, was reasonably foreseeable" (emphasis added)).

with the shooting itself – was a direct consequence of Petitioners' unlawful actions, and the Ninth Circuit correctly concluded that they are responsible for the resulting harm to Respondents under basic notions of proximate cause. App. 24a.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY RULING ALSO DOES NOT WARRANT REVIEW.

Petitioners also attack the Ninth Circuit's qualified immunity analysis. Pet. 23-33. In deciding this issue, courts engage in a two-pronged inquiry. Under the first prong, courts must examine whether the facts "[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a [federal] right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under the second prong, courts ask whether the right at issue was "clearly established" at the time of the alleged misconduct. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The Court recently emphasized that, in deciding *both* prongs, all inferences must be drawn in favor of the non-moving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.").

Both prongs are satisfied here. As to the first prong, the Ninth Circuit recognized that the search took place "one hour" after O'Dell had last been seen, there was "no immediate or continuous pursuit of the subject," and "the deputies lacked any credible information that [O'Dell] was in

Plaintiffs' shack." App. 13a-14a (internal quotation marks omitted). On this record, the Ninth Circuit correctly concluded that the deputies' conduct was contrary to *Steagald* (451 U.S. at 211-12), *Welsh* (466 U.S. at 753), and *Johnson* (256 F.3d at 908). *See supra* at 9 (discussing Ninth Circuit's analysis and supporting case law). As to the second prong of the qualified immunity analysis, this Court decided *Steagald* in 1981 and *Welsh* in 1984, and the Ninth Circuit decided *Johnson* in 2001. The right at issue was therefore clearly established, at the appropriate level of specificity, at the time of the officers' misconduct.

Petitioners' qualified immunity argument is misdirected at best. They claim, for example, that the Ninth Circuit failed to analyze whether the officers should have expected that their conduct was likely to provoke a violent response. Pet. 27. But that is not the constitutional violation at issue (the first prong of the qualified immunity analysis). Instead, the constitutional violation at issue, as noted previously, is searching Respondents' residence without a warrant in the absence of exigent circumstances, which is contrary to this Court's opinions in *Steagald* and *Welsh* and the Ninth Circuit's opinion in *Johnson*. App. 24a (discussed *supra* at 9). The Ninth Circuit's provocation analysis, as limited by *Billington*, merely provides a familiar framework for determining liability where, as here, a plaintiff alleges a constitutional tort: (1) did the defendant violate the plaintiff's constitutional rights and (2) what harms were proximately caused by that violation? *See supra* at 6. That analytical

framework is not the proper focus of either prong of the qualified immunity test.

Other Circuits have similarly focused on the constitutional violation that allegedly caused harm. In *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996), for example, the Seventh Circuit held:

> Viewed in the light most favorable to Sledd, the evidence shows that Baker's act of shooting Sledd at the top of the stairs was unjustified, even assuming that the police still had some right of self defense after they had broken into the house and failed to identify themselves or to announce their purpose. In short, Sledd's evidence shows that the police officers behaved in an objectively unreasonable fashion and were therefore not entitled to qualified immunity.

And in *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991), the Sixth Circuit likewise held:

> It was not 'objectively reasonable' for Currie to enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his hat. Thus, because the right Officer Currie is alleged to have violated was clearly established, and because Officer Currie's actions preceding the shooting were not those of an objectively reasonable police officer, we conclude that qualified immunity is not appropriate.

Here too, the Ninth Circuit below correctly focused on whether "the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant." App. 18a.

But even if it were necessary to consider the provocation issue for purposes of qualified immunity, those legal principles are also clearly established. Since at least 2002 – when the Ninth Circuit decided *Billington* – it has been clearly established in the Ninth Circuit that if a plaintiff can establish an independent Fourth Amendment violation then "liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused." *Billington*, 292 F.3d at 1190.[6] Rejecting a similar qualified immunity argument in *Pauly*, the Tenth Circuit squarely held that "it has been clearly established since 2006 that for an officer to be liable under Section 1983, the officer's conduct must be both a but-for and proximate cause of the plaintiff's constitutional harm." 814 F.3d at 1075-76. Likewise, it has been clearly established since at least 1986 – when this Court decided *Malley* –

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[6] Petitioners also argue that *Billington* requires a "violent response" whereas Mr. Mendez did not respond violently. Pet. 31. In *Billington*, the Ninth Circuit used the phrase "violent confrontation," not "violent response." 292 F.3d at 1189. In addition, as the Ninth Circuit below explained, Petitioners' argument on this point is "unpersuasive" because it would mean that victims of police violence are entitled to damages under the provocation doctrine if they point a weapon at police and shout "I'll kill you," but "would be out of luck" if they were merely "holding a BB gun and didn't intend to threaten the police." App 23a. That makes no sense.

that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley*, 475 U.S. at 344 n.7. Lower courts uniformly agree that § 1983 claims are governed by basic principles of tort law, including proximate cause. *See supra* at 13-14 n.2. Whether analyzed under the Ninth Circuit's provocation rubric or basic notions of proximate cause – the Ninth Circuit below did both – the controlling legal principles have been clearly established for decades.

Petitioners next claim that "[a] reasonable officer would not expect to find residents living in a dilapidated shed, which appeared uninhabitable." Pet. 27. Putting aside the fact that this argument ignores the rights and circumstances of impoverished individuals, the district court expressly rejected this argument based on the evidence at trial:

> Having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable. They had been told that the shack was inhabited. The shack was a different structure than the [storage] sheds. The shack was in a different location. The following were all indicia of habitation: The air conditioner, electric cord, water hose, and clothes locker.

App. 67a ¶ 106 (emphasis added); *see also* App. 60a-62a ¶¶ 39-57 (describing shed). The district

court's findings are reviewed for "clear error" (*see supra* at 11), and Petitioners have not even attempted to establish such error. Nor can they.

The same evidence, along with the evidence and findings set forth on page 11 above, also refutes Petitioners' argument that they could not have reasonably anticipated that entering such a structure would provoke a violent confrontation and that what happened here was merely "an unfortunate coincidence." Pet. 32. Based on the information available to Petitioners before they illegally entered Respondents' home, the district court found that a reasonable officer would have known that a violent confrontation was "foreseeable." App. 126a-127a. The Ninth Circuit likewise concluded that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." App. 25a. That, too, is an intensely factual issue and does not remotely warrant this Court's review.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE CLAIMED CAUSATION ISSUES.

Even if Petitioners could establish that the Ninth Circuit has adopted a proximate cause analysis that conflicts with the decisions of other circuits or with the decisions of this Court (which they cannot), the Petition should be denied because this case is a poor vehicle for reviewing the claimed causation issues. That is so for at least the following reasons:

1. Rather than presenting a clear legal issue for the Court's consideration, Petitioners are rearguing their version of the facts. Petitioners do not take issue (nor can they) with the Ninth Circuit's ruling that "[b]ecause this case involves the deputies' renewed assertion of qualified immunity after judgment, we recite the following facts in the light most favorable to the nonmoving parties and the factfinder's verdict" (App. 3a), yet they repeatedly present the facts in the light most favorable to their own arguments. They claim, for example, that they did not expect to find residents living in the shack, yet they were told beforehand that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)" and the shack had an air conditioner, electric cord, water hose, and clothes locker. App. 59a ¶ 25; App. 67a ¶ 106. They also claim that the confrontation with Respondents was not foreseeable, but the district court – following a bench trial – found that it was. App. 126a-127a. Petitioners assert numerous other "facts" that are not only contrary to the district court record but are material to the formulation and resolution of the Questions Presented in their Petition. Such factual disputes do not warrant this Court's review.

2. The Ninth Circuit's analysis is manifestly correct and does not rely solely on the court's provocation doctrine. As noted previously, the Ninth Circuit squarely held that Petitioners "violated the Fourth Amendment by searching the shack without a warrant" (App. 22a), and Petitioners do not argue otherwise. Instead, the central issue in the case is whether Petitioners'

conduct proximately caused Respondents' injuries, and there is ample evidence supporting the district court's ruling that "the conduct of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries." App. 126a-127a. Not only is that an intensely factual issue, reviewed solely for clear error, the Ninth Circuit expressly held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Because the provocation doctrine is not outcome determinative here, the Court should decline review.

3. Far from putting the "lives of officers at risk" (Pet. 23), Petitioners' arguments – if accepted by this Court – would seriously threaten officer safety. *See supra* at 18-19. The Eighth Circuit squarely rejected a similar "officer safety" argument as follows: "Counsel may shout 'officer safety' until blue-in-the-face, but the Fourth Amendment does not tolerate, nor has the Supreme Court or this Court ever condoned, pat-down searches without some specific and articulable facts to warrant a reasonable officer in the belief that the person detained was armed and dangerous." *El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 460 (8th Cir. 2011) (internal quotation marks and citation omitted). In *Yates*, the Sixth Circuit similarly held that "[a]n officer who intentionally enters a dark hallway in the entrance of a private residence in the middle of the night, and fails to give any indication of his identity, is more than merely negligent." 941 F.2d at 447. The same reasoning applies where, as here, police officers search a

home without a warrant, without exigent circumstances, and without identifying themselves as police officers. And these considerations are no less important when victims of a police shooting live in circumstances that others might consider "uninhabitable." Pet. 27.

4. The equities in this case overwhelmingly favor the district court's liability determination and damages award. The Ninth Circuit expressly found that whether the officers were "plainly incompetent" was "quite debatable." App. 10a. Respondents, in contrast, had not committed a crime and were not suspected of doing so. They were simply lying on a futon in the wooden shack in which they resided. App. 56a ¶ 2. Yet as a direct result of Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, and Mrs. Mendez (pregnant at the time) was shot in the back. Respondents' damages are substantial: they include over $816,000 for past medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez. App. 53a-54a. The result in this case is fair and just and, absent further review, will appropriately deter similar violations of Fourth Amendment rights. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."). For this reason too, the Ninth Circuit's analysis does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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OCTOBER 24, 2016

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AND
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Supreme Court, U.S.
FILED
NOV - 3 2016
OFFICE OF THE CLERK

No. 16-369

In the Supreme Court of the United States

**COUNTY OF LOS ANGELES,
DEPUTY CHRISTOPHER CONLEY
and DEPUTY JENNIFER PEDERSON,**

Petitioners,

—v—

ANGEL MENDEZ and JENNIFER LYNN GARCIA,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 9

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S "PROVOCATION" RULE SHOULD BE OVERTURNED.

The Ninth Circuit's "provocation" rule puts the lives of officers at mortal risk by imposing civil liability for a *reasonable* use of force. An officer who has *not used excessive force* but who has nevertheless otherwise violated an individual's constitutional rights, must refrain from defending himself even if his life is threatened or be held financially liable in a 42 U.S.C. § 1983 action. According to the Ninth Circuit, the rule required the police officers here to reflect upon whether their decision to search the Respondents' shed was constitutional during the split-second moment when they were faced with what reasonably appeared to be a deadly threat, because they "created a situation which led to the shooting." (App.22a-23a.)

As the "provocation" rule is plainly improper, Respondents attempt to minimize its role in this case, contending "the Ninth Circuit did not find liability on an excessive force claim," and therefore there is no merit to Petitioners' argument that the "provocation" rule contravenes *Graham*. (Opp.Br.8.) To the contrary, the officers in this case were specifically found liable for their *reasonable* use of force under the Ninth Circuit's "provocation" rule. "The court concluded that given Conley's reasonably mistaken fear upon seeing Mendez's BB gun, the deputies did not use excessive force when shooting the Mendezes, *see Graham v. Connor*, 490 U.S. 386 (1989), but the depu-

ties were liable for the shooting under our circuit's provocation rule articulated in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)." (App.6a.) The approximately $4,000,000 in damages awarded in favor of Respondents were based solely on the Ninth Circuit's "provocation" rule. (App.52a-54a, 135a-136a.) As the "provocation" rule violates *Graham*, it cannot stand.

A. There Is a Plain Conflict Between the Ninth Circuit's Provocation "Rule" and the Law in Other Circuits.

Surprisingly, Respondents argue there is no conflict with the Sixth Circuit or Third Circuit, despite the fact that in *Sheehan*, this Court explicitly recognized the Ninth Circuit's "provocation" rule has been "sharply questioned" by other circuits. *City & Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1776 n.4 (2015). Indeed, the Sixth Circuit has specifically rejected the doctrine.

Notably, Respondents fail to acknowledge the cases cited by Petitioners setting forth the law of the Second, Fourth, Fifth, Seventh and Eleventh Circuits, which directly conflict with the Ninth Circuit's "provocation" rule. Those circuits hold pre-seizure conduct should not be considered in evaluating the reasonableness of an officer's use of force.

Moreover, Respondents misstate the law of the Sixth and Eight Circuits. In *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007), the Sixth Circuit specifically rejected *Billington* and the "provocation" rule. *Id.* at 406; *see also Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001) (the Sixth Circuit's "segmenting" analysis requires the use of deadly force to be deter-

mined separately from prior actions taken by the officers).[1]

Likewise, the Eighth Circuit only scrutinizes the seizure itself, and not the events leading up to the seizure.[2] *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). In *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995), the Eighth Circuit rejected the plaintiff's argument that the officers' conduct prior to the seizure caused the circumstances which ultimately led to the need to use deadly force, as such an analysis violated *Graham*. *Id.* at 648. The Court criticized *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) for this reason. *Id.* at 649 n.3.[3]

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[1] In *Estate of Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), cited to by respondents, the Sixth Circuit held summary judgment was improper as triable issues of fact existed regarding whether the officers *reasonably believed they were in danger* prior to shooting the decedent, which is not an issue here, as the trier of fact specifically found the officers reasonably feared for their safety. (App.108a.)

[2] Respondents cite to *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000), wherein the Eighth Circuit upheld the denial of summary judgment as, again, there was a factual dispute regarding the threat to the officer and whether the officer reasonably believed the decedent was reaching for a weapon. *Id.* at 1042-43.

[3] Nevertheless, in *Starks*, again, the Court was analyzing whether the officer *reasonably believed the suspect posed a threat*, by determining whether the suspects' vehicle moved toward the officers before or after the officers were in harms' way. *Starks*, 5 F.3d at 234. Here, it is undisputed the officers reasonably believed Mr. Mendez posed a deadly threat. (App.108a.) Also, following *Starks*, the Seventh Circuit stated force is measured at the time it is applied, without considering the propriety of the officers' actions leading up to the force.

Notably, Respondents concede, as they must, that the Court of Appeals are in conflict regarding whether pre-shooting conduct should be considered in determining the reasonableness of the force. (Opp.Br.17 ("Over time, the Circuits can be expected to reach consensus on that point, and the Court should allow the process to continue.").) The "provocation" rule requires a plaintiff to show: (1) *that an officer intentionally or recklessly provoked a violent confrontation*, and (2) the provocation was an independent Fourth Amendment violation. *Billington v. Smith*, 292 F.3d 1177, 1189-90 (9th Cir. 2002). Whether an officer's conduct which provokes a violent confrontation should be considered in analyzing whether the force was reasonable at the moment of the seizure, is the identical issue discussed by the foregoing cases regarding whether an officer's pre-seizure conduct should be considered in determining the reasonableness of force. If not, the "provocation" rule cannot stand.

Moreover, even if pre-seizure conduct can be considered in the force analysis, the trier of fact must still be allowed to determine whether the force was excessive under the totality of the circumstances. The severity of the threat is a crucial factor in determining the reasonableness of a use of force, and the officers in this case were faced with what appeared to be a rifle pointed directly at them. However, although the court acknowledged the officers reasonably believed they faced a deadly threat, instead of analyzing the reasonableness of the force based upon the totality of

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Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994).

the circumstances, liability was specially imposed under the "provocation" rule. (App.52a-54a, 135a-136a.)

II. Review Should Be Granted to Settle Whether the Qualified Immunity Analysis Must Be Tailored if the "Provocation" Rule Is Upheld.

As the "provocation" rule imposes liability against an officer for a *constitutional use of force* if the officer intentionally or recklessly provokes a violent confrontation, the qualified immunity analysis must be tailored, and a reviewing court must determine: (1) whether the officer committed a predicate constitutional violation; (2) whether *every* reasonable officer in the position of the defendant would have known his conduct in committing the predicate constitutional violation was unlawful; and (3) whether *every* reasonable officer in the position of the defendant would have known his conduct would provoke a violent confrontation.

Respondents focus their argument upon whether the law was clearly established such that every officer in the defendant's position would have known his conduct was unlawful in relation to the predicate constitutional violation of the warrantless entry only, which is not the issue presented by Petitioners.

Moreover, the cases cited by Respondents in addressing qualified immunity, *Sledd v. Linsday*, 102 F.3d 282 (7th Cir. 1996) and *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), do not involve cases where damages were imposed for a *reasonable* use of force. Rather, those cases involve qualified immunity in failure to "knock and announce" cases, which is not

at issue here.[4] Respondents' repeated argument that the officers should have known their "unannounced" entry may lead to the need to shoot the homeowners who armed themselves against possible intruders, is foreclosed by the Ninth Circuit's ruling that the officers are entitled to qualified immunity from the "knock and announce" claim.

In addition, Respondents argue qualified immunity should not be argued from the defendants' point of view. (Op.Br.26 n.6.) Of course, qualified immunity is an objective assessment, from the officer's point of view and the specific circumstances facing him at the time of the incident. *Sheehan*, 135 S. Ct. at 1774 (the contours of the right must have been sufficiently definite that any reasonable official *in his shoes* would have understood that he was violating it). Moreover, this Court has not set the contours for liability under the "provocation" rule. *Compare Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015) (per curiam) (as the Supreme Court had not discussed parameters of right, law was not clearly established).

Furthermore, the Ninth Circuit law is not clearly established, given the earlier cases holding a defendants' conduct must have escalated a situation and provoked a violent response; an earlier constitutional violation, in of itself, is insufficient to establish liability. *Billington*, 292 F.3d at 1189-90; *Duran v. City of*

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[4] *Sledd*, 102 F.2d at 288 (court assessed whether officer was entitled to qualified immunity for use of force, *assuming* officer had right to self-defense following unlawful entry for failing to knock-and-announce his presence); *Yates*, 942 F.2d at 447 (officer acted unreasonably prior to shooting and failed to identify himself in dark hallway).

Maywood, 221 F.3d 1127, 1131 (9th Cir. 2000) (the defendant's conduct must have caused an *escalation* which led to the use of force). However, in *Mendez*, instead of determining whether the officers intentionally or recklessly provoked a violent confrontation, the Ninth Circuit focused only upon whether the officers intentionally or recklessly committed the predicate violation of the warrantless entry. Yet, not every constitutional violation should reasonably provoke a violent confrontation with a resident.

Here, there was no interaction or escalation of an event between the deputies and the Respondents prior to the need for the officers to use force to defend their lives—the officers did not even cross the threshold of the shed prior to seeing the gun. Not *every* reasonable officer in the position of the defendants would have believed their conduct would provoke a violent confrontation and, in fact, as Respondents concede, it did not. (Opp.Br.26 n.6.)

III. DAMAGES FROM A *REASONABLE* USE OF FORCE ARE NOT *PROXIMATELY CAUSED* BY AN UNLAWFUL ENTRY.

As the "provocation" rule clearly conflicts with the proper manner in which to determine whether liability should be imposed for a use of force, Respondents argue the damages should be upheld as being proximately caused by the warrantless entry. Respondents argue the district court's finding of proximate cause cannot be set aside unless it was clearly erroneous. (Opp.Br.11.) *However, the district court did not find Respondents' damages were proximately caused by the warrantless entry, rather, the district court awarded damages based on the*

"provocation" rule. (App.52a-53a, 135a-136a.) The damages found to have been proximately caused due to the warrantless entry amounted to $1.00. (*Id.*) Accordingly, there is no merit to Respondents' argument.

Furthermore, the Fourth Amendment protects the rights of individuals to be free from a warrantless search of their home, as well as the right to be free from an unreasonable seizure of their person. The shooting of an individual by a police officer is a seizure of his person, and is not a foreseeable risk from a warrantless entry into the person's home. Respondents argue officers should recognize that if they make warrantless entry into a home, that conduct in of itself justifies the residents to shoot them. (Opp.Br.18-19.) However, a homeowner may not resist an unlawful entry into his home, simply because of its unlawfulness. *See also James v. Chavez*, 511 Fed.Appx. 742, 747 (10th Cir. 2013).

It is not foreseeable that a warrantless entry alone would immediately cause the residents therein to aim weapons at police officers and, indeed, that is not what happened in this case. Rather, Mr. Mendez was moving his gun as he believed his friend was approaching, at the precise moment when Deputy Conley saw what appeared to be a rifle aimed directly at him. While Respondents argue Mr. Mendez was "startled" (Opp.Br.11), he was not aiming his gun at the deputies and their conduct did not "provoke" him to threaten the officers.

Every event has many causes, and only some of them are proximate, as the law uses that term. In *Paroline v. United States*, 134 S.Ct. 1710 (2014), relied

upon by Respondents, this Court explained that to say that one event was a proximate cause of another means that it was not just any cause, but one with "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 1719 (citations omitted). Proximate cause is stricter than cause-in-fact, and "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Id.* (citing 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29, p. 493 (2005)). For example,

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29, cmt. (d)(3) (2010).

Similarly, the risk of entry without a warrant is unwarranted government intrusion into the privacy of one's home. However, a warrantless entry, in of itself, does not inherently carry a risk of use of

excessive force by a government official, which is a separate harm which must be analyzed separately. *Bodine v. Warick*, 72 F.3d 393, 400 (3d Cir. 1995). *Even farther removed from the foreseeability analysis is the risk that someone inside a home will be moving a gun used for pest control, at the very moment an officer enters a home without a warrant.* Like the preceding example, the risk here was simply too attenuated from the alleged wrongful conduct and was not foreseeable. Thus, as a matter of law, proximate causation cannot be established for the $4,000,000 in damages awarded for Respondents' injuries from the shooting, as a result of the warrantless entry.

There is a split of authority regarding whether, following an unlawful entry, an officer's need to use reasonable force is a superseding, intervening event, cutting off the chain of causation for damages caused by the use of force. As indicated in the petition, the majority of circuits hold that officers who unlawfully enter a home are *not* liable for harm caused by a reasonable use of force, which is a superseding cause of the harm. *See e.g., Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011) ("as long as 'the officer['s] use of force was reasonable given the plaintiff's acts, *then despite the illegal entry*, the plaintiff's own conduct would be a [superseding] cause that limited the officer['s] liability.'") (emphasis added); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000) (same); *see also Estate of Sowards v. City of Trenton*, 125 Fed.Appx. 31, 42 (6th Cir. 2005).

Respondents misinterpret the Third Circuit's earlier decision in *Bodine*, which holds that damages stemming from an unlawful entry *do not* include

damages resulting from a *reasonable* use of force. The Court held that even if the officers' entry was unlawful, they would only be liable for the harm "proximately" caused by their illegal entry. *Bodine*, 72 F.3d at 400. However, the officers would not be liable for harm produced by a "superseding cause." *The Court stated the officers "certainly" would not be liable for harm that was caused by a use of reasonable force. Id.* The Court emphasized the determination of liability based upon the illegal entry versus the excessive force *must be kept separate. Id.* "The harm proximately caused by these two torts may overlap, *but the two claims should not be conflated.*" *Id.* at 401 (emphasis added). The Third Circuit stated it was up to the jury to determine the harm proximately caused by the unlawful entry. *Id.* at 400. Here, the trier of fact determined the damages proximately caused by the warrantless entry were $1.00.

The Court in *Bodine* relied upon *George v. Long Beach*, 973 F.2d 706 (9th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993), wherein the Ninth Circuit found that although the officers were liable for nominal damages due to a warrantless entry into the plaintiff's home, they were not liable for the compensatory damages which were caused by the officer's use of force after entering the home. *Bodine*, 72 F.3d at 400.

Respondents rely upon cases from the Tenth Circuit which indicate an officer could be held liable for injuries from a use of force following an unlawful entry, *which directly conflict with the cases set forth above.* (Opp.Br.13 (citing *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016) and *Attocknie v. Smith*, 798 F.3d 1252 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 2008

(2016).) Respondents attempt to argue the majority cases should be disregarded, as they involve situations where the homeowner knew it was police who were entering the home. However, a gun aimed by a homeowner at a police officer who the homeowner believes to be an intruder, is no less dangerous to the officer. *As recognized in* Pauly, *foreseeability for proximate causation must be determined from the actor's point of view. Pauly*, 814 F.3d at 1066-67. Moreover, again, the officers are immune from claims they failed to knock and announce their presence, in any event.

CONCLUSION

Petitioners-Defendants respectfully submit the petition for writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 3, 2016

RECORD AND BRIEFS

FILED
JAN 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY AND DEPUTY JENNIFER PEDERSON,
Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
SEPTEMBER 16, 2016
CERTIORARI GRANTED DECEMBER 2, 2016

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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Western Division – Los Angeles) CIVIL DOCKET FOR CASE #: 2:11-cv-04771-MWF-PJW

Angel Mendez et al v. Leroy D Baca et al

Assigned to: Judge Michael W. Fitzgerald

Referred to: Magistrate Judge Patrick J. Walsh

Case in other court: 9th CCA, 13-56686
9th CCA, 13-57072

Cause: 42:1983 Civil Rights Act

Date Filed: 06/03/2011

Date Terminated: 08/27/2013

Jury Demand: Both

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: Federal Question

Date Filed	#	Docket Text
10/19/2011	31	SECOND AMENDED COMPLAINT against defendants Christopher Conley, County of Los Angeles, County of Los Angeles Sheriffs Department, Jennifer Pederson amending Amended Complaint 23 ,filed by plaintiffs Angel Mendez,

Date Filed	#	Docket Text
		Jennifer Lynn Garcia (bp) (Additional attachment(s) added on 11/3/2011: # 1 summons) (bp). (Entered: 10/20/2011)
06/11/2012	45	NOTICE OF MOTION AND MOTION for Summary Judgment as to All Cause of Action Against Defendants, Pursuant to Federal Rules of Civil Procedure, Rule 56. filed by Defendants Christopher Conley, County of Los Angeles, Jennifer Pederson. Motion set for hearing on 7/9/2012 at 10:00 AM before Judge Michael W Fitzgerald. (Attachments: # 1 Declaration DECLARATION OF DEPUTY JENNIFER PEDERSON AND ATTACHED EXHIBITS IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION, # 2 Declaration DECLARATION OF DEPUTY CHRISTOPHER CONLEY AND ATTACHED EXHIBITS

Date Filed	#	Docket Text
		IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION, # 3 Declaration DECLARATION OF BRITTANY L. VANNOY, ESQ., IN SUPPORT OF DEFENDANT COUNTY OF LOS ANGELES, DEPUTY JENNIFER PEDERSON, AND DEPUTY CHRISTOPHER CONLEYS MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION/PARTIAL SUMMARY JUDGMENT, # 4 Proposed Order [PROPOSED] JUDGMENT, # 5 Proposed Order [PROPOSED] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AS TO ALL DEFENDANTS)(Bianco, Erica) (Entered: 06/11/2012)
08/03/2012	79	ORDER DENYING IN PART AND GRANTING IN PART

Date Filed	#	Docket Text
		DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION 45 by Judge Michael W Fitzgerald. (kbr) (Entered: 08/03/2012)
08/27/2012	193	MINUTES OF Final Pretrial Conference and Hearing on Motions in Limine held before Judge Michael W Fitzgerald. Court Reporter: Rosalyn Adams. (kbr) (Entered: 08/28/2012)
02/26/2013	219	MINUTES OF Court Trial (1st day) held before Judge Michael W. Fitzgerald: Opening statements made. Witnesses called, sworn and testified. Exhibits identified and admitted. Bench Trial continued to 2/27/2013 at 8:30 AM. Court Reporter: Rosalyn Adams. (kbr) (Entered: 02/27/2013)
02/27/2013	220	MINUTES OF Court Trial (2nd day) held before Judge Michael W. Fitzgerald: Witnesses called, sworn and

Date Filed	#	Docket Text
		testified. Exhibits identified and admitted. Bench Trial continued to 2/28/2013 at 8:30 AM. Court Reporter: Rosalyn Adams. (kbr) (Entered: 02/28/2013)
02/28/2013	221	MINUTES OF Court Trial (3rd day) held and continued before Judge Michael W. Fitzgerald: Witnesses called, sworn and testified. Exhibits identified and admitted. Plaintiff(s) rest. Case continued to 3/1/2013 at 8:30 AM., for further trial/further jury deliberation. Court Reporter: Rosalyn Adams/Theresa Lanza (PM). (jp) (Entered: 03/01/2013)
03/01/2013	222	MINUTES OF Court Trial (4th day)held before Judge Michael W. Fitzgerald: Witnesses called, sworn and testified. Exhibits identified and admitted. Defendant rests. Counsel shall file its closing briefs, not to exceed 15 pages, no later than April 1, 2013. Upon receipt of the briefs, the Court will set a

Date Filed	#	Docket Text
		hearing date. Court Reporter: Rosalyn Adams. (kbr) (Entered: 03/01/2013)
04/19/2013	231	MINUTES OF Court Trial (5th Day) held and completed before Judge Michael W. Fitzgerald: Closing arguments made. Defendant shall file a responsive brief with respect to damages, no later than April 24, 2013. Court Reporter: Rosalyn Adams. (kbr) (Entered: 04/19/2013)
04/19/2013	233	LIST OF EXHIBITS AND WITNESSES at trial. (jp) (Entered: 04/22/2013)
08/13/2013	250	FINDINGS OF FACT AND CONCLUSIONS OF LAW signed by Judge Michael W. Fitzgerald. (jp) (Entered: 08/14/2013)
08/27/2013	256	JUDGMENT AFTER TRIAL by Judge Michael W. Fitzgerald. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment on the merits be entered (See attached

Date Filed	#	Docket Text
		Judgment for further details). On Plaintiffs California tort claims: Judgment is entered in favor of Defendants Deputies Conley and Pederson. (MD JS-6, Case Terminated). (jp) (Entered: 08/27/2013)
08/28/2013	257	RESPONSE filed by Plaintiffs Jennifer Lynn Garcia, Angel Mendezto Judgment, 256 *PLAINTIFFS REQUEST FOR AMENDED JUDGMENT* (Leff, Michael) (Entered: 08/28/2013)
09/04/2013	258	OBJECTIONS *Defendants Objection to Plaintiff's Request for Amended Judgment and Notice of Intent to File an Opposition and Request for Time to File an Opposition; Declaration of Brittany Vannoy in Support Thereof* filed by Defendants Christopher Conley, County of Los Angeles, Jennifer Pederson. (Vannoy, Brittany) (Entered: 09/04/2013)

Date Filed	#	Docket Text
09/17/2013	264	MINUTE ORDER (IN CHAMBERS) by Judge Michael W. Fitzgerald: This matter is before the Court on the Plaintiffs Request for Amended Judgment (the Request). (Docket No. 257). The court has read and considered the papers filed on this Request. For the reasons stated below, the Request is DENIED. Accordingly, the Court DENIES the Request for an Amended Judgment. IT IS SO ORDERED. re: Response (non-motion) 257 . (yl) (Entered: 09/17/2013)
09/24/2013	266	NOTICE OF MOTION AND MOTION to AMEND Judgment, 256 , Findings of Fact & Conclusions of Law 250 *or Make Additional Findings on Behalf of Defendants County of Los Angeles, Christopher Conley and Jennifer Pederson* filed by defendants Christopher Conley, County of Los Angeles Sheriffs Department, Jennifer Pederson. Motion set for hearing on 10/28/2013 at

Date Filed	#	Docket Text
		10:00 AM before Judge Michael W. Fitzgerald. (Attachments: # 1 Exhibit A, # 2 Exhibits B and C)(Hurrell, Thomas) (Entered: 09/24/2013)
09/26/2013	267	NOTICE OF APPEAL to the 9th CCA filed by defendants Christopher Conley, Jennifer Pederson. Appeal of Judgment, 256 , Findings of Fact & Conclusions of Law 250 (Appeal fee FEE NOT PAID.) (Cantrall, Melinda) (Entered: 09/26/2013)
11/20/2013	279	(IN CHAMBERS) ORDER DENYING MOTION TO AMEND THE JUDGMENT OR MAKE ADDITIONAL FINDINGS OF FACTS by Judge Michael W. Fitzgerald: The Motion 266 is denied. See order for details. (jloz) (Entered: 11/20/2013)
11/20/2013	280	MINUTES (IN CHAMBERS) ORDER GRANTING Motion for Attorney Fees 259 by Judge Michael W. Fitzgerald:

Date Filed	#	Docket Text
		The Court awards attorneys' fees in the amount of $1,672,729.97. The Court finds that Plaintiffs are entitled to recover reasonable litigation expenses. With regard to Defendants' argument that Plaintiffs' costs are not supported by sufficient documentation, Plaintiffs have submitted various bills and receipts documenting expenses incurred in this litigation. Plaintiffs should seek payment for costs, pursuant to the procedure in Local Rule 54. Therefore, the Motion is GRANTED as modified in this Order. (jp) (Entered: 11/20/2013)
11/25/2013	283	First AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by defendants Christopher Conley, County of Los Angeles, Jennifer Pederson. Amending Notice of Appeal to 9th Circuit Court of Appeals 267 Filed On: 9/26/13; Entered On: 9/26/13;

Date Filed	#	Docket Text
		(Cantrall, Melinda) (Entered: 11/25/2013)
12/17/2013	291	TRANSCRIPT for proceedings held on thursday, February 28, 2013; 1:25 PM. Court Reporter: THERESA LANZA, phone number www.theresalanza.com, 661-303-4776. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 1/7/2014. Redacted Transcript Deadline set for 1/17/2014. Release of Transcript Restriction set for 3/17/2014. (Lanza, Theresa) (Entered: 12/17/2013)
06/26/2014	298	TRANSCRIPT for proceedings held on 02/26/13, 8:49 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number

Date Filed	#	Docket Text
		rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	299	TRANSCRIPT for proceedings held on 02/28/13, 8:53 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it

Date Filed	#	Docket Text
		may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	300	TRANSCRIPT for proceedings held on 3/01/13, 8:35 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for

Date Filed	#	Docket Text
		9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	301	TRANSCRIPT for proceedings held on 02/27/13, 8:30 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	302	TRANSCRIPT for proceedings held on 4/19/13, 8:17 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number

Date Filed	#	Docket Text
		rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	303	TRANSCRIPT for proceedings held on 8/13/13, 3:00 PM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it

Date Filed	#	Docket Text
		9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	301	TRANSCRIPT for proceedings held on 02/27/13, 8:30 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	302	TRANSCRIPT for proceedings held on 4/19/13, 8:17 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number

Date Filed	#	Docket Text
		rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	303	TRANSCRIPT for proceedings held on 8/13/13, 3:00 PM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it

Date Filed	#	Docket Text
		may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	304	TRANSCRIPT for proceedings held on 11/18/13, 11:21 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for

Date Filed	#	Docket Text
		9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)
06/26/2014	305	TRANSCRIPT for proceedings held on 8/27/13, 10:00 AM. Court Reporter/Electronic Court Recorder: ROSALYN ADAMS, phone number rosalyn.adams494@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/17/2014. Redacted Transcript Deadline set for 7/27/2014. Release of Transcript Restriction set for 9/24/2014. (Adams, Rosalyn) (Entered: 06/26/2014)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals **Docketed:** 09/27/2013
Docket #: 13-56686 **Termed:** 03/02/2016
Nature of Suit:
3440 Other Civil Rights
Angel Mendez, et al
v.
County of Los Angeles, et al
Appeal From:
U.S. District Court for Central California,
Los Angeles
Fee Status: Paid

ANGEL MENDEZ; JENNIFER LYNN GARCIA,

Plaintiffs – Appellees,

v.

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES SHERIFFS DEPARTMENT

Defendants,

and

CHRISTOPHER CONLEY, Deputy; JENNIFER PEDERSON,

Defendants – Appellants,

Date Filed	#	Docket Text
09/27/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellants Christopher Conley and Jennifer Pedersen on 10/11/2013. Mediation Questionnaire due on 10/04/2013. Transcript ordered by 10/28/2013. Transcript due 01/27/2014. Appellants Christopher Conley and Jennifer Pedersen opening brief due 03/10/2014. Appellees Jennifer Lynn Garcia and Angel Mendez answering brief due 04/09/2014. Appellant's optional reply brief is due 14 days after service of the answering brief. [8799763] (FB) [Entered: 09/27/2013 11:14 AM]
11/25/2013	7	Received copy of amended notice of appeal from district court amended notice of appeal to thc united states court of appeals for the 9th circuit on behalf defendants deputy jennifer pedersen and

Date Filed	#	Docket Text
		deputy christopher conley: representation statement . [8878859] (MT) [Entered: 11/26/2013 10:26 AM]
12/10/2013	9	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL RE CROSS APPEAL. SEND MQ: Yes. Setting cross-appeal briefing schedule as follows: Fee due from Cross-Appellants Jennifer Lynn Garcia and Angel Mendez on 12/24/2013. Mediation Questionnaire due on 12/17/2013. First cross appeal brief due 04/14/2014 for Christopher Conley and Jennifer Pedersen. Second brief on cross appeal due 05/14/2014 for Jennifer Lynn Garcia and Angel Mendez. Third brief on cross appeal due 06/13/2014 for Christopher Conley and Jennifer Pedersen. Optional reply brief on cross appeal due 14 days from the service of third brief for Jennifer Lynn Garcia and Angel Mendez. [8895305] [13-57072, 13-

Date Filed	#	Docket Text
		56686] (FB) [Entered: 12/10/2013 09:25 AM]
10/15/2014	19	Submitted (ECF) First Brief on Cross-Appeal and excerpts of record for review. Submitted by Appellants Christopher Conley and Jennifer Pedersen in 13-56686. Date of service: 10/15/2014. [9277612] [13-56686, 13-57072] --[COURT UPDATE: Updated docket text to reflect correct brief type and attached corrected brief and excerpts of record. 10/20/2014 by TL] (Cantrall, Melinda) [Entered: 10/15/2014 01:38 PM]
02/13/2015	34	Submitted (ECF) Second Brief on Cross-Appeal and supplemental excerpts of record for review. Submitted by Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellants Jennifer Lynn Garcia and Angel Mendez in 13-57072. Date of service: 02/13/2015. [9421995] [13-56686, 13-57072] (Drexler,

Date Filed	#	Docket Text
		David) [Entered: 02/13/2015 04:53 PM]
05/29/2015	44	Submitted (ECF) Third Brief on Cross-Appeal and supplemental excerpts of record for review. Submitted by Appellants Christopher Conley, Jennifer Pedersen and - County of Los Angeles in 13-56686, Appellees Christopher Conley, Jennifer Pedersen and - County of Los Angeles in 13-57072. Date of service: 05/29/2015. [9555085] [13-56686, 13-57072] --[COURT UPDATE: Updated docket text to reflect correct brief type. 06/01/2015 by TL] (Cantrall, Melinda) [Entered: 05/29/2015 02:40 PM]
09/09/2015	54	Submitted (ECF) Cross-Appeal Reply Brief for review. Submitted by Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellants Jennifer Lynn Garcia and Angel Mendez in 13-57072. Date of service: 09/09/2015. [9676984] [13-56686, 13-57072] (Drexler,

Date Filed	#	Docket Text
		David) [Entered: 09/09/2015 04:07 PM]
12/08/2015	60	ARGUED AND SUBMITTED TO RONALD M. GOULD, MARSHA S. BERZON and GEORGE CARAM STEEH, III. [9783965] [13-56686, 13-57072] (LN) [Entered: 12/08/2015 01:12 PM]
03/02/2016	61	FILED OPINION (RONALD M. GOULD, MARSHA S. BERZON and GEORGE CARAM STEEH, III) 13-56686 is AFFIRMED IN PART and REVERSED IN PART; and 13-57072 is DISMISSED AS MOOT. Judge: RMG Authoring, FILED AND ENTERED JUDGMENT. [9885656] [13-56686, 13-57072] (RMM) [Entered: 03/02/2016 07:02 AM]
04/15/2016	67	Filed (ECF) - County of Los Angeles and Appellants Christopher Conley and Jennifer Pederson in 13-56686, - County of Los Angeles and Appellees

Date Filed	#	Docket Text
		Christopher Conley and Jennifer Pederson in 13-57072 petition for panel rehearing and petition for rehearing en banc (from 03/02/2016 opinion). Date of service: 04/15/2016. [9941843] [13-56686, 13-57072] (Cantrall, Melinda) [Entered: 04/15/2016 12:57 PM]
04/22/2016	68	Filed order (RONALD M. GOULD, MARSHA S. BERZON and GEORGE CARAM STEEH, III) Plaintiffs-Appellees are ordered to file a response to Defendants-Appellants' Petition for Panel Rehearing or Rehearing En Banc. The response is not to exceed 20 pages, and must be filed no later than 21 days from the date of this order. [9949934] [13-56686, 13-57072] (OC) [Entered: 04/22/2016 01:31 PM]
05/24/2016	80	Filed (ECF) Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellants Jennifer Lynn

Date Filed	#	Docket Text
		Garcia and Angel Mendez in 13-57072 response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 05/24/2016. [9989220]. [13-56686, 13-57072] (Feldman, Leonard) [Entered: 05/24/2016 02:49 PM]
06/01/2016	83	Filed (ECF) Appellants Christopher Conley, Jennifer Pederson and - County of Los Angeles in 13-56686, Appellees Christopher Conley, Jennifer Pederson and - County of Los Angeles in 13-57072 reply to. Date of service: 06/01/2016. [9999184]. [13-56686, 13-57072] (Cantrall, Melinda) [Entered: 06/01/2016 06:55 PM]
06/02/2016	84	Filed (ECF) Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellants Angel Mendez and Jennifer Lynn Garcia in 13-

Date Filed	#	Docket Text
		57072 response to motion ([83] Reply to Answer to PFPR/EB (ECF Filing)). Date of service: 06/02/2016. [9999726] [13-56686, 13-57072] (Feldman, Leonard) [Entered: 06/02/2016 10:37 AM]
06/23/2016	86	Filed order (RONALD M. GOULD, MARSHA S. BERZON and GEORGE CARAM STEEH, III): Appellants' Petition for Panel Rehearing is DENIED. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petition for Rehearing En Banc is DENIED. [10027263] [13-56686, 13-57072] (AF) [Entered: 06/23/2016 02:30 PM]
06/29/2016	87	Filed (ECF) - County of Los Angeles and Appellants Christopher Conley and Jennifer Pederson in 13-56686, - County of Los

Date Filed	#	Docket Text
		Angeles and Appellees Christopher Conley and Jennifer Pederson in 13-57072 Motion to stay the mandate. Date of service: 06/29/2016. [10033289] [13-56686, 13-57072] (Cantrall, Melinda) [Entered: 06/29/2016 09:41 AM]
07/01/2016	88	Filed order (RONALD M. GOULD, MARSHA S. BERZON and GEORGE CARAM STEEH, III) Appellants' Motion to Stay Issuance of the Mandate for 90 Days Pending the Filing of a Petition for Writ of Certiorari is GRANTED. [10036642] [13-56686, 13-57072] (OC) [Entered: 07/01/2016 11:40 AM]
08/01/2016	99	Filed (ECF) Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellants Jennifer Lynn Garcia and Angel Mendez in 13-57072 Motion for attorney fees in the amount of $185,797.50 for Law Offices of David Drexler and

Date Filed	#	Docket Text
		$190,320.00 for Benedon and Serlin LLP. Date of service: 08/01/2016. [10071584] [13-56686, 13-57072] (Drexler, David) [Entered: 08/01/2016 04:53 PM]
09/19/2016	106	Filed (ECF) - County of Los Angeles and Appellants Christopher Conley and Jennifer Pederson in 13-56686, - County of Los Angeles and Appellees Christopher Conley and Jennifer Pederson in 13-57072 Correspondence: Notice of Filing Petition for Writ of Certiorari. Date of service: 09/19/2016 [10128435] [13-56686, 13-57072] (Cantrall, Melinda) [Entered: 09/19/2016 04:11 PM]
09/22/2016	107	Filed (ECF) Appellants Christopher Conley, Jennifer Pederson, - County of Los Angeles, County of Los Angeles Sheriffs Department and Appellees Jennifer Lynn Garcia and Angel Mendez in 13-56686, Appellees Christopher Conley, Jennifer

Date Filed	#	Docket Text
		Pederson, - County of Los Angeles, County of Los Angeles Sheriffs Department and Appellants Jennifer Lynn Garcia and Angel Mendez in 13-57072 Stipulated Motion for attorney fees in the amount of $65,000. Date of service: 09/22/2016. [10132992] [13-56686, 13-57072] (Feldman, Leonard) [Entered: 09/22/2016 11:47 AM]
09/23/2016	108	Received notice from the Supreme Court: petition for certiorari filed on 09/16/2016. Supreme Court Number 16-369. [10134843] [13-56686, 13-57072] (RR) [Entered: 09/23/2016 12:20 PM]
12/05/2016	112	Received notice from the Supreme Court. Petition for certiorari GRANTED on 12/02/2016. The petition for a writ of certiorari is granted limited to Questions 1 and 3 presented by the petition. Supreme Court Number 16-369. [10220350] [13-56686, 13-

Date Filed	#	Docket Text
		57072] (RR) [Entered: 12/05/2016 01:10 PM]

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Attorneys for Plaintiffs
ANGEL MENDEZ and
JENNIFER LYNN
GARCIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL MENDEZ and JENNIFER LYNN GARCIA,	Case No.: CV11-04771 JHN (PJWx)
	SECOND AMENDED COMPLAINT
Plaintiffs,	
v.	
COUNTY OF LOS ANGELES, A Government Entity, DEPUTY CHRISTOPHER CONLEY, as an individual and in his official capacity as an agent and employee of	1. VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. SECTION 1983 2. ASSAULT AND BATTERY 3. INTENTIONAL INFLICTION OF

the COUNTY OF LOS ANGELES, DEPUTY JENNIFER PEDERSON, as an individual and in her official capacity as an agent and employee of the COUNTY OF LOS ANGELES, and DOES 3-50, inclusive.	EMOTIONAL DISTRESS 4. NEGLIGENCE **PRAYER FOR ATTORNEY'S FEES PURSUANT TO [42 U.S.C. § 1988(b)]** **DEMAND FOR JURY TRIAL**

Defendants.

Plaintiffs, ANGEL MENDEZ and JENNIFER LYNN GARCIA, complain of Defendants, and each of them, as follows:

JURISDICTION AND VENUE

1. The United States District Court, Central District of California is the proper jurisdiction for the bringing of this claim pursuant to United States law, *42 U.S.C. § 1983*. This action is brought for damages and other appropriate relief under *in 42 U.S.C. § 1983* for violation of the Plaintiffs' civil rights under color of state law.

2. The acts and omissions complained of occurred in the Central District of California. Therefore, venue of this action is proper under *28 U.S.C.A. § 1391(b)*.

3. Plaintiffs have tendered their claims against the County of Los Angeles pursuant to *Government Code §§ 900, et seq.*, and 945, *et seq.* Said claims were rejected.

4. Jurisdiction is conferred upon this court by *28 U.S.C.A § 1331* and *28 U.S.C.A. § 1343 (a)(3).*

PARTIES

5. Plaintiffs, ANGEL MENDEZ and JENNIFER LYNN GARCIA (hereinafter "Plaintiffs") are natural persons, and at all times relevant herein, were residents of the County of Los Angeles, in the City of Lancaster.

6. Plaintiff JENNIFER LYNN GARCIA, at all times relevant herein, was visibly pregnant, with the unborn child of ANGEL MENDEZ.

7. Defendant, County of Los Angeles, is at all times relevant herein, was a public entity, existing under the laws of the State of California and responsible for the policies, procedures and practices implemented through its various agencies, agents, departments and employees, including the County of Los Angeles Sheriff's Department, and for the injury occasioned thereby.

8. Defendant, Deputy Christopher Conley, Badge No. 519471 (formerly identified as Doe No. 1), at all times relevant herein, was an employee

of the County of Los Angeles Sheriff's Department, with peace officer status.

9. Defendant, Deputy Jennifer Pederson, Badge No. 459503 (formerly identified as Doe No. 2), at all times relevant herein, was an employee of the County of Los Angeles Sheriff's Department, with peace officer status.

10. DOES 3 through 30, are, and, at all times relevant herein, were sworn employees of the County of Los Angeles Sheriff's Department, with peace officer status, or were deputy sheriffs or duly authorized law enforcement personnel and are, hereinafter.

11. Defendant, Deputy Christopher Conley, Badge No. 519471, Defendant, Deputy Jennifer Pederson, Badge No. 459503, and DOES 3 through 30 are collectively referred to and identified as "DEPUTY CONLEY" or "DEPUTY PEDERSON" or "DEPUTIES," interchangeably.

12. DOES 31 through 40, are, and at all times relevant herein, were public entities located in the County of Los Angeles, State of California.

13. DOES 41 through 50 are, and at all times relevant herein, were employees of the aforementioned public entities.

14. The true names, identities and capacities, whether individual, associate, corporate or

otherwise, of defendants DOES 3 through 50, inclusive, and each DOE in between, are unknown to Plaintiff at this time, who, therefore, sues said Defendants by such fictitious names. When the true names and capacities, or participation of such fictitiously designated Defendants are ascertained, Plaintiffs will ask leave of court to amend this complaint to insert said true names, identities and capacities, together with the proper charging allegations. Plaintiffs are informed and believe and thereon allege that each of the Defendants sued herein as a DOE is responsible in some manner for the occurrence herein alleged and the cause of Plaintiffs' injuries and damages alleged herein.

15. Plaintiffs are informed and believe and thereon allege that, at all relevant times herein, each of the defendants, and DOES 3 through 50, were the agents, employees and/or joint venturers, or working in concert with, the other co-defendants and were acting within the course and scope of such agency, employment and/or joint venture or concerted activity. To the extent that said conduct was perpetrated by certain Defendants, the remaining defendants and DOES confirmed and ratified the same.

16. Plaintiffs are informed and believe, and thereon allege, that, at all relevant times herein, each defendant, and DOES 3 through 50, were controlled and supervised by the co-

defendants and each was the alter ego of the other.

17. Whenever and wherever reference is made in the within complaint to any conduct by any defendant, defendants or DOES, such allegations and references shall also be deemed to mean the conduct of each of the defendants, acting individually, jointly and severally. Whenever reference is made to individuals or DOES who are not named as defendants in this complaint, but were employees or agents of other defendants, such individuals, at all relevant times, acted on behalf of Defendants or respective DOES named in this paragraph within the scope of their respective employment.

18. All defendants were, at all times material to this Complaint, acting under color and authority of state law.

THE FACTS

19. On October 1, 2010, Plaintiffs resided in the rear single room residence structure, located at the rear of the residence at 43263 18th Street West, in the City of Lancaster, County of Los Angeles. This rear single room structure was readily discernable as a residence because of its large size; because the attached air conditioning unit; because of the exterior bamboo window shade; and because of the hinged door; and because of the makeshift

handle enabling the door to be shut from the inside.

20. On October 1, 2010, at approximately 9:45 p.m., Defendant DEPUTIES, including DOES 3 through 30, appeared, unannounced, at said location.

21. Said DEPUTIES, barged into the 43263 18th Street West residence, physically roughed up and handcuffed its female owner occupant, Paula Hughes, even though she was compliant and repeatedly advised the DEPUTIES that the male individual they were searching for was not on the premises.

22. Prior to entering the rear single room residence - appurtenant structure at the rear of the 43263 18th Street West residence, Defendants, and each of them, including DEPUTY CONLEY and DEPUTY PEDERSON, failed to:

i. Comply with Los Angeles Sheriff's Department policies and procedures;

ii. Establish a perimeter around the appurtenant structure in accordance with Los Angeles County Sheriff's Department policies and procedures; and

ii. Establish probable cause or reasonable suspicion that the person they were looking for was at the subject residence or appurtenant structure.

23. Thereafter, Defendants, and each of them, including DEPUTY CHRISTOPHER CONLEY and DEPUTY JENNIFER PEDERSON, charged outside to the rear single room residence - appurtenant structure and, without either first knocking on the door or announcing their authority or purpose, as required by *California Penal Code* § 1531, said Defendants trespassed upon Plaintiffs' property without valid legal authority, provocation or justification and, opened the door and stormed in carrying loaded weapons.

24. Defendants, and each of them, including DEPUTY CONLEY and DEPUTY PEDERSON, intentionally, and without complying with "knock and announce" requirements, pursuant to *California Penal Code* § 1531, entered Plaintiffs' appurtenant structure without being refused admittance and without waiting a reasonable and sufficient amount of time to infer that the occupants had refused the DEPUTIES admittance.

25. Upon entering Defendants, and each of them, including DEPUTY CONLEY and DEPUTY PEDERSON, immediately, intentionally and with reckless disregard for the safety and Constitutional rights of Plaintiffs, shot Plaintiff, Angel Mendez, fourteen (14) times and also shot Plaintiff, Jennifer Garcia, in the back. DEPUTY CONLEY and DEPUTY

PEDERSON discharged their weapons into Plaintiffs.

26. Defendants, and each of them, including DEPUTY CONLEY and DEPUTY PEDERSON, failed to provide Plaintiffs with any verbal warning prior to shooting them, such as by announcing their presence and demanding that the occupants open the door, or come out. There was no provocation, or threat of death or serious physical injury to the DEPUTIES, or others, to provide the Defendants, including the DEPUTIES, the legal right to use deadly force upon Plaintiffs.

27. At the time of the shooting, Defendants, including the DEPUTIES, did not have a warrant either to, search the main premises, Plaintiffs' appurtenant structure, nor were any exigent circumstances present which might have excused the DEPUTIES' duty to comply with "knock and announce" requirements pursuant to *California Penal Code* § 1531.

28. At no time were Plaintiffs suspects in a criminal investigation, nor was there any probable cause to believe that they posed a significant threat of death or serious physical injury to the DEPUTIES or others.

29. At the time of the subject shootings, said DEPUTIES and DOES 3 through 30 did not, objectively or subjectively, have a reasonable

belief that Plaintiffs posed any threat of bodily harm to them.

30. At the time of their shooting, both Angel Mendez and Jennifer Garcia were sleeping in the appurtenant structure and were not, in any manner, attempting to resist or to pose a risk of harm to the DEPUTIES.

31. As a result and substantial factor of the shooting by Defendants, including the DEPUTIES, Angel Mendez suffered gunshot wounds, requiring treatment, including, but not limited to, the amputation of his leg. As a result and substantial factor of the shooting by Defendants and the DEPUTIES, Jennifer Garcia also suffered gunshot wounds, suffered a fractured collar bone and severe emotional distress from her injuries as well as by seeing her fiancé shot approximately fourteen (14) times.

32. Plaintiffs allege that DEPUTIES have a pattern and practice of shooting unarmed victims, shooting Latinos disproportionately when compared to other races/nationalities during the years 2005 - 2010 and of not receiving sufficient training and being out of compliance with its own mandate for tactical firearms training, according to a 2011 report by Special Counsel Merrick J. Bobb. Furthermore, there is a pattern and practice of DEPUTIES discharging their service firearms at increased rates, as in 2010, DEPUTIES discharged their

firearms in a greater number than at any time since the statistics began being maintained in 1996.

FIRST CAUSE OF ACTION:
VIOLATION OF CIVIL RIGHTS UNDER
42 U.S.C. § 1983
(AGAINST ALL DEFENDANTS)

33. Plaintiffs repeat and re-allege by reference each and every prior allegation and incorporate the same herein as though fully set forth herein.

34. This Cause of Action sets forth a claim for deprivation of civil rights for violations of the Fourth Amendment to the United. States Constitution against each Defendant herein, and is redressable pursuant to *42 U.S.C. § 1983.*

35. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *California Constitution*, Article 1, § 1.

36. All people enjoy the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Constitution, Amendment IV.*

37. The subject DEPUTIES acted unreasonably, and in violation of *California Constitution,* Article 1, § 1, and *U.S. Constitution, Amendment IV,* when they unjustifiably entered Plaintiffs' appurtenant structure, violated their constitutional privacy rights and intentionally shot Angel Mendez fourteen (14) times and also shot Jennifer Garcia, who was pregnant at the time, in the back.

38. The DEPUTIES entry into the rear structure was unreasonable as:

i. The DEPUTIES failed to knock and announce their presence and authority prior to entering Plaintiffs' dwelling or appurtenant structure, pursuant to *California Penal Code* § 1531;

ii. The DEPUTIES failed to furnish a search warrant (if a valid one existed at the time of the subject incident) to allow Plaintiffs an opportunity to review its contents and its legal effect, pursuant to the laws of the State of California;

iii. There was a lack of exigent circumstances present to allow the DEPUTIES to enter Plaintiffs' dwelling or appurtenant structure without a valid search warrant;

iv. There was a lack of probable cause that a crime was being committed, contraband was being destroyed or that Plaintiffs posed potential serious risk of harm or death to the DEPUTIES.

39. Defendants, including the DEPUTIES, acted or purported to act in the performance of their official duties as peace officers and under color of state law.

40. The conduct of Defendants, including the DEPUTIES, violated Plaintiffs' constitutional right of privacy and is redressable pursuant to *42 U.S.C. § 1983*, which provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...."

41. Plaintiffs were each deprived of an interest protected by the Constitution or the laws of the United States, and each Defendant actually and proximately caused any such deprivation while acting under color of state law.

42. As a direct and proximate cause and substantial factor of Defendants' acts and omissions and unlawful conduct, Plaintiffs have suffered, and will continue to suffer, damages and injuries, including, but not

limited to, bodily injury, severe emotional distress, loss of earnings and employment benefits, medical and psychological expenses.

43. Plaintiffs are informed and believe and thereon allege that all acts or omissions alleged to have been engaged in by any Defendant are alleged to have been engaged in with evil motive and intent, and/or callous, reckless and wanton disregard to the rights of the Plaintiffs, and that such misconduct as has been alleged is animus malus and contrary to the standards of the community.

44. Plaintiffs are informed and believe, and thereon allege, that Defendants knowingly, or with deliberate indifference to the Constitutional and statutory rights of persons within the jurisdiction of the United States of America, including Plaintiffs, maintained or allowed to exist an official policy or custom of permitting the occurrence of the types of wrongs set forth herein.

45. Plaintiffs are informed and believe, and thereon allege, that the County of Los Angeles failed to properly train, hire, retain and supervise their employees who deprived Plaintiffs of an interest protected by the Constitution or the laws of the United States and caused Plaintiffs' damages, and failed to properly supervise the operations of their staff, and therefore are responsible for Plaintiffs' damages.

46. Plaintiffs are informed and believe, and thereon allege, that Defendants, and each of them, acting through their officials and employees, maintained, fostered and condoned an official policy, practice and/or custom of deliberately ignoring the civil rights of persons, including Plaintiffs, thereby evidencing indifference to the civil liberties of Plaintiffs whose injuries caused Plaintiffs to sustain monetary damages. Plaintiffs are informed and believe and thereon allege that Defendants' policy, custom and practice of deliberate indifference to the civil rights and liberties of persons, including Plaintiffs, include, among other things:

    i. Defendants' failure to properly supervise, hire and train their employees regarding their duty to comply with the laws of the United States of America and the State of California

47. Plaintiffs are further informed and believe and thereon allege that the above-described official customs, policies, practices and actions of each Defendant constituted deliberate indifference to the Constitution and statutory rights of persons, such as Plaintiffs. Plaintiffs are further informed and believe and thereon allege that this official policy, practice and custom and/or Defendants' actions and omissions were a direct, proximate and actual cause of Plaintiffs' injuries and damages.

48. Based upon the principles set forth in *Monell v. New York City Department of Social Services* (1978) 436 U.S. 658, each supervisory official Defendant is liable personally for all injuries sustained by Plaintiffs as set forth herein. Said liability stems from the fact that the aforementioned Defendants' deliberate and unconstitutional policies and customs were a direct, proximate and actual cause of Plaintiffs' damages and the pain and suffering that Plaintiffs have experienced. Any and all supervisory official Defendants are liable on this theory and are also liable in their individual capacities. Each supervisory Defendant ignored or summarily dismissed the rights and liberties provided by the laws and Constitution of the United States of America.

49. Plaintiff are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done with willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all Defendants.

50. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were not reasonable and, therefore, are not protected by any immunities, absolute or qualified, pursuant to *Graham v. Connor* (1989) 490 U.S. 386, 396, as Plaintiffs:

i. Had not committed a crime, severe or otherwise;

ii. Did not pose, subjectively and objectively, an immediate threat to the safety of the officers or others; and

iii. Did not actively resist arrest or attempt to evade arrest by flight.

51. As a result of each Defendant's conduct as alleged herein, Plaintiffs are entitled to attorney's fees pursuant to *42 U.S.C. § 1988.*

52. By failing to properly screen, train, supervise and/or discipline its attendant and protective personnel, Defendants violated Plaintiffs' rights under the United States Constitution.

53. By authorizing, ratifying and/or condoning the acts and omissions of their agents and employees, Defendants violated Plaintiffs' rights under the Amendment of the United States Constitution.

54. The acts and omissions complained of herein were done pursuant to customs and policies authorized, condoned, ratified, approved and carried out by all Defendants that resulted in the deliberate indifference to the rights and liberties provided to Plaintiffs under the laws of the United States and/or resulted in furtherance of a pattern and practice of abuse of residents of the County of Los Angeles.

SECOND CAUSE OF ACTION: ASSAULT AND BATTERY (AGAINST ALL DEFENDANTS)

55. Plaintiffs repeat and re-allege by reference each and every prior allegation and incorporate the same herein as though fully set forth herein.

56. Defendants caused Plaintiffs to be placed in the immediate apprehension of harm by engaging in the following conduct:

i. When said DEPUTIES unreasonably entered Plaintiffs' dwelling or structure without knocking and announcing their presence;

ii. When said DEPUTIES pointed their guns at Plaintiffs and Plaintiffs saw the DEPUTIES' guns pointed at them;

iii. When the DEPUTIES fired rounds from their guns directly at Plaintiffs.

57. Defendants, and each of them, including DEPUTY CHRISTOPHER CONLEY and DEPUTY JENNIFER PEDERSON caused Plaintiffs to be shot with the intent to cause harm by shooting them.

58. Plaintiffs did not consent to being shot at by Defendants.

59. Plaintiff, Angel Mendez, was shot fourteen (14) times and Plaintiff, Jennifer Garcia, who was pregnant at the time, was shot in the back,

resulting in serious and harmful injuries to both Plaintiffs.

60. A reasonable person in Plaintiffs' situation would have been offended if rounds of live gunfire made contact with his or her body in the same manner as Plaintiffs.

61. As a direct and proximate cause and substantial factor of Defendants' acts and omissions and unlawful conduct, Plaintiffs have suffered, and will continue to suffer, damages and injuries, including, but not limited to, bodily injury, severe emotional distress, loss of earnings and employment benefits, medical and psychological expenses.

62. Plaintiffs are informed and believe, and thereon allege, that all acts or omissions alleged to have been engaged in by any Defendant are alleged to have been engaged in with evil motive and intent, and/or callous, reckless and wanton disregard to the rights of the Plaintiffs, and that such misconduct as has been alleged is animus malus and contrary to the standards of the community.

63. Plaintiffs are informed and believe, and thereon allege, that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs,

thereby justifying the awarding of punitive and exemplary damages against all Defendants.

THIRD CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (AGAINST ALL DEFENDANTS)

64. Plaintiffs repeat and re-allege by reference each and every prior allegation and incorporate the same herein as though fully set forth herein.

65 The aforementioned DEPUTIES and DOES 3 through 30, intentionally entered the Plaintiffs' dwelling or structure without being refused admittance, without waiting a reasonable and sufficient amount of time to infer that the occupants had refused their admittance and without probable cause.

66. Upon entering, the DEPUTIES and DOES 3 through 30, immediately and intentionally shot Angel Mendez fourteen (14) times and also shot Jennifer Garcia in the back.

67. Said DEPUTIES and DOES 3 through 30 failed to provide Plaintiffs with any warning, verbal or otherwise, prior to shooting them.

68. At the time of the shooting, Defendants, including the DEPUTIES, did not have a warrant either to search the premises, Plaintiffs' appurtenant structure or to arrest

its occupants, nor were any exigent circumstances present which might have excused the DEPUTIES' duty to comply with knock and announce requirements, pursuant to *California Evidence Code* §§ 844 and 1531.

69. At no time were Plaintiffs suspects in a criminal investigation, nor was there any probable cause to believe that Plaintiffs posed a significant threat of death or serious physical injury to the DEPUTIES or others.

70. At the time of their shooting, both Angel Mendez and Jennifer Garcia were sleeping in their appurtenant structure and were not, in any manner, attempting to resist or to pose a risk of harm to Defendants and the DEPUTIES.

71. Each and every aforementioned act and omission by the DEPUTIES and DOES 3 through 30 was outrageous.

72. The DEPUTIES, and each one of them, intended to cause Plaintiffs emotional distress or acted with reckless disregard of the probability that Plaintiffs would suffer emotional distress, knowing that plaintiffs were present when the conduct occurred.

73. Defendants and the DEPUTIES reckless and outrageous conduct is evidenced by the following:

i. Intentionally entering Plaintiffs' dwelling without being refused admittance and without waiting a reasonable and sufficient amount of time to infer that the occupants had refused their admittance.

ii. Upon entering, the DEPUTIES and DOES 3 through 30, immediately pointed their guns at Plaintiffs and intentionally shot Angel Mendez fourteen (14) times and also shot Jennifer Garcia in the back.

iii. Failing to provide Plaintiffs with any warning, verbal or otherwise, prior to shooting them.

iv. Failing to secure a legally valid warrant either to search the premises, Plaintiffs' appurtenant structure or to arrest its occupants, or, in the alternative, there were no exigent circumstances present which might have excused the DEPUTIES' duty to comply with knock and announce requirements and or their duty to not use deadly force unless adequate provocation exists.

74. The outrageous conduct of the DEPUTIES and DOES 3 through 30 is so extreme that it goes beyond all possible bounds of decency. A reasonable person in a similar situation would regard the aforementioned conduct as intolerable in a civilized community.

75. The DEPUTIES and DOES 3 through 30 abused their position as Los Angeles County Sheriffs and Police Officers, which gave them real or apparent power to affect Plaintiffs interests, including their Amendment rights to be free from unreasonable searches and seizures.

76. Plaintiffs, and each of them, suffered severe emotional distress, including post traumatic stress syndrome, loss of sleep, anxiety, nervousness, fear, depression, anguish, horror, grief, worry, shock and other related symptoms.

77. The DEPUTIES' and each of them, conduct was a substantial factor in causing Plaintiffs' severe emotional distress.

78. Plaintiffs are informed and believe, and thereon allege, that all acts or omissions alleged to have been engaged in by any Defendant are alleged to have been engaged in with evil motive and intent, and/or callous, reckless and wanton disregard to the rights of the Plaintiffs, and that such misconduct as has been alleged is animus malus and contrary to the standards of the community.

79. Plaintiff is informed and believes and thereon alleges that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of

the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all Defendants.

FOURTH CAUSE OF ACTION:
NEGLIGENCE
(AGAINST ALL DEFENDANTS)

80. Plaintiffs repeat and re-allege by reference each and every prior allegation and incorporate the same herein as though fully set forth herein.

81. Defendants and each of them, including the DEPUTIES, acted negligently by, amongst other things, breaching the standard of care related to:

i. Entering Plaintiffs' dwelling.
ii. Shooting Angel Mendez fourteen (14) times and shooting Jennifer Garcia in the back.
iii. Failing to provide Plaintiffs with a reasonable warning, prior to entering Plaintiffs' residence and shooting them.
iv. Failing to secure a legally valid warrant to either enter or search the premises where Plaintiffs resided.
v. Using deadly force.
vi. Failing to adhere to Los Angeles County Sheriff's Department pre-shooting policy and procedures.

82. At no time were Plaintiffs suspects in a criminal investigation, nor was there any

probable cause to believe that they posed a significant threat of death or serious physical injury to the DEPUTIES or others.

83. At the time of their shooting, both Angel Mendez and Jennifer Garcia were sleeping in their appurtenant structure and were not, in any manner, attempting to resist or to pose a risk of harm to Defendants, and any of them, or the DEPUTIES.

84. Plaintiffs suffered harm including Angel Mendez being shot fourteen (14) times and Jennifer Garcia being shot in the back.

85. Defendants and each of them, including the DEPUTIES, were a substantial factor in causing Plaintiffs' injuries and damages, including bodily injury, severe emotional distress, loss of earnings and employment benefits, medical and psychological expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For general and special damages according to proof;
2. For costs of suit;
3. For attorney's fees pursuant to statute, including *42 U.S.C. §§ 1983* and *1988*;
4. For pre-judgment and post-judgment interest, if any shall be incurred;

5. For punitive damages against the individual defendants (and not against the County of Los Angeles); and

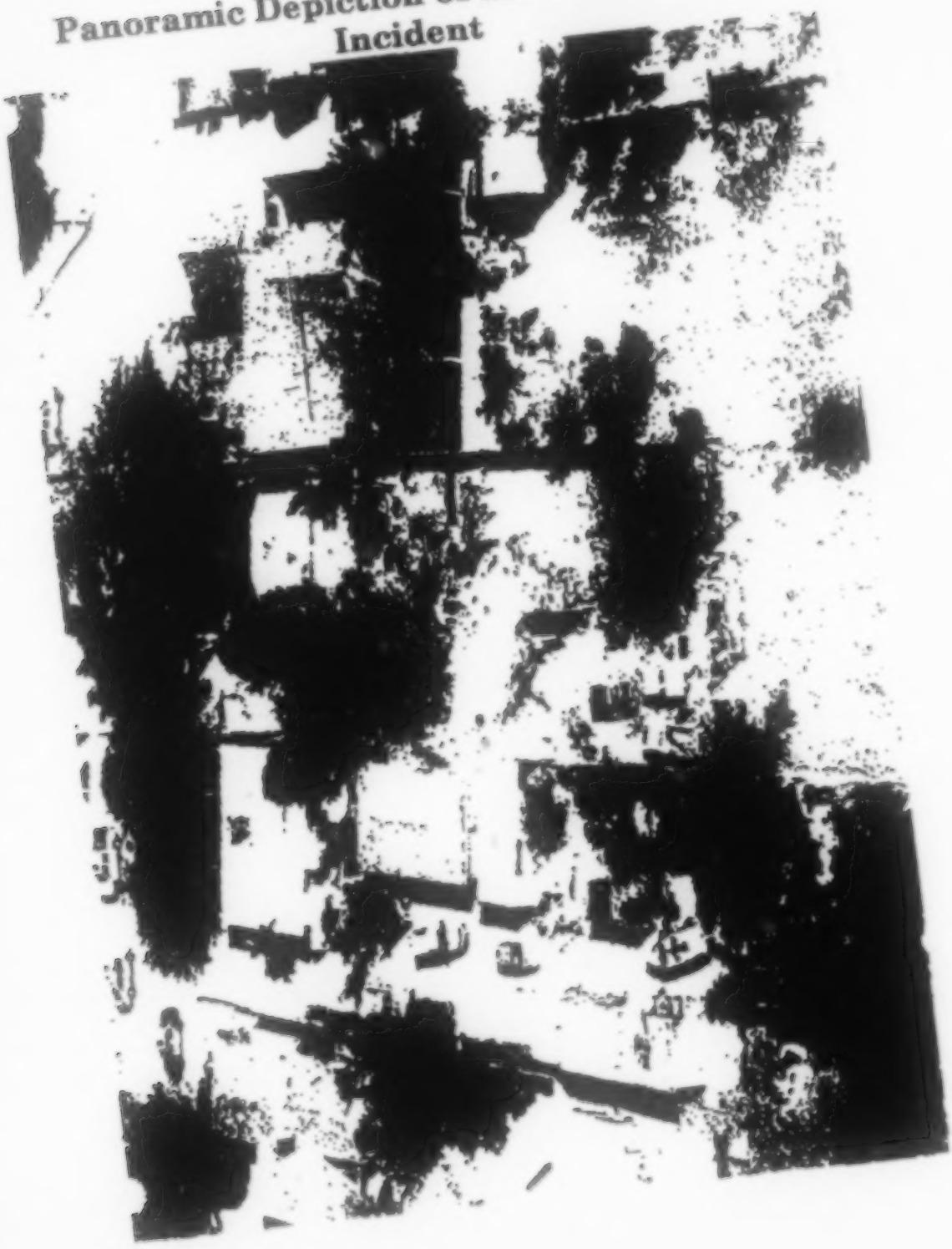
6. For such other and further relief as the court may deem proper.

Date: October 18, 2011 Respectfully submitted,

LAW OFFICES OF DAVID DREXLER

By: /s/ David Drexler
David Drexler
Attorney for Plaintiffs:
ANGEL MENDEZ and
JENNIFER LYNN GARCIA

Trial Exhibit No. 31
Panoramic Depiction of the Scene of the Incident



COUNTY OF LOS ANGELES-SHERIFF'S DEPARTMENT-SUPPLEMENTARY REPORT

DATE: 10-01-2010 Friday 1246 Hours

FILE: 010-21291-1126-055

ACTION: Active/ Additional Information

C: *ASSAULT with a DEADLY WEAPON, FIREARM, on a PEACE OFFICER—245(d)(1) PC /F/ 055;
*BRANDISH FIREARM in a PEACE OFFICER'S PRESENCE—417c PC /F/ 151
DEPUTY INVOLVED SHOOTING

V: DEPUTY CHRISTOPHER CONLEY #519471

V: DEPUTY JENNIFER PEDERSON #459503

W: GARCIA, JENNIFER FW/04-09-1983
43263 18TH ST. WEST, LANCASTER, CA. 93534

J: HUGHES, PAULA SUE FW/02-10-1979
43263 18th ST. WEST, LANCASTER, CA. 93534 661-948-3288

S: MENDEZ, ANGEL MICHAEL MH/04-09-1980 CDL:#D2684302 N.I.C.
43263 18th ST. WEST, LANCASTER, CA. 93534

NARRATIVE

The purpose of this report is to provide additional information regarding the "Deputy Involved Shooting" that occurred at 43263 18th St. West, Lancaster, today (Friday, 10-01-2010) at 1246 hours. (For more information see the first report and the additional supplemental reports.)

BY: DET. S. OWEN #258449
DET. M. DONNEL #467589

APPROVED:
LT. D. Downton
#211229

ASSIGNED: HOMICIDE

SECRETARY:_____

DATE:_____ **TIME:**_____

* * *

OCTOBER 08, 2010 010-21291-1126-055

RESPONE

On 10/01/2010, Investigators, Sergeant Robert J. Gray and Sergeant Martin L. Rodriguez, were detailed to respond to 43262 18th Street West, in the City of Lancaster, to investigate the facts and circumstances surrounding the deputy involved shooting that caused Suspect, Angel Mendez to be injured by gunfire at the location.

Investigators arrived at the location at approximately 1630 hours and initially responded to the command post, located in the parking lot at 20th Street West and Avenue K. Investigators were informed that Detective P. Guzman and Detective J. Duncan, from the Sheriff's Homicide Bureau had been detailed to assist with this investigation. Investigators left the command post and went to the scene of the shooting, 43262 18th Street West, where Guzman and Duncan were directed to conduct a crime scene investigation, the actions and observations of Guzman and Duncan will be documented in a supplementary report and be made a permanent part of this file.

* * *

shed, she heard Mendez crying and explaining to the deputies that he was only trying to show the deputies that the rifle was merely a BB gun.

Paramedics were called to the scene to treat Garcia and Mendez for their gunshot wounds. She was subsequently transported to the hospital, where she said she was treated for a gunshot wound that broke her right clavicle. She also told Investigators that she was treated well by the deputies at the scene. The interview was terminated.

Investigators contacted **Deputy Christopher Conley, #519471**, who is assigned to the Sheriff's Department, Community Oriented Policing Bureau, HIT Team, stationed out of Lancaster Station. Deputy Conley has been a Deputy Sheriff since 08/02/2006 and has been working his current assignment since February of 2010. Deputy Conley was wearing a standard Class B uniform, with a clearly marked Sheriff's, green vest cover, over his uniform shirt. Present with Deputy Conley, was his attorney, Mitchell S. Kander. The interview was recorded and the following is a summary of the statement.

Deputy Conley went to 43263 18th Street West, Lancaster, while assisting members of the Lancaster Station, Target Oriented Policing Team, in the search of a known and wanted parolee at large suspect, who was potentially located on the premises. Deputy Conley and his partner, Deputy Pederson were detailed to go to the rear of the residence, provide containment and search or clear sheds or out buildings on the property.

Deputy Conley and Deputy Pederson approached what appeared to be a wooden storage shed, located in the back yard, some distance west of the primary

residence. Prior to approaching the above shed, he and Deputy Pederson had already cleared three structures on the property. When he approached the shed in question, he noted it had an unlocked, swinging door, located on the east side of the shed. Inside of the swinging door, he noted a pinned and hanging blanket on the doorway, that obscured and prevented a view into the shed.

Deputy Conley made no announcement and proceeded to move the swinging door and blanket away from the threshold, in order to allow him to peer into the interior of the shed and clear it of occupants. When he moved the blanket away and peered into the dimly lit interior, he was immediately confronted by the barrel of a rifle. He was startled and surprised to be staring down the barrel of a rifle and the rifle was being held in a threatening manner by the silhouette of a male inside the shed.

Deputy Conley thought he would be killed and thought the suspect with the rifle, "Got the drop on him and he would die." Deputy Conley emphasized, that he thought he was going to be killed. Deputy Conley shouted, "Gun, gun," simultaneously firing his duty weapon at the silhouette holding the rifle. He fired multiple shots and while firing his weapon, he proceeded to move away from the shed, as well as the threat of the rifle wielding male. He moved away to find and take cover, but only found concealment behind the thin wooden walls of the shed. He thought the suspect was armed with a hunting rifle and wanted to create distance between him and the threat. He did not conduct a tactical re-load because

he thought it would not be safe to re-load while the threat was still apparent.

Deputy Conley knew his partner was located to his rear and to his left. He knew she fired her weapon because he heard the sound of her weapon discharging and it was out of sync with the bullets fired from his weapon, but he did not see her firing her weapon. He estimated he fired five to twelve rounds from his weapon. After the shooting subsided, he ordered the occupants out of the shed. He heard the male who had been brandishing the rifle explain that he had been shot in the leg, but he was able to crawl out of the shed. A female followed the male out of the shed and it was determined that she had been shot in the shoulder or arm. When both parties were secure, he illuminated the interior of the shed with his flashlight and discovered the rifle lying atop the bed inside the shed. The male and female were subsequently attended to by other deputies and then by responding paramedics.

Deputy Conley explained that his duty weapon is a Beretta, 92F, serial number #H45126Z and he holstered his weapon immediately following this incident. He also said he did not alter the weapon in any manner after the incident. Prior to the shooting, Deputy Conley claimed he maintained his duty weapon with one round in the chamber and fifteen rounds in the magazine. Deputy Conley's duty weapon was collected by F.I.S. Dan Rosell and was determined to have one live round in the chamber and five live rounds in the magazine, indicating that

Deputy Conley potentially fired ten rounds from his duty weapon. This interview was terminated.

Investigators contacted **Deputy Jennifer M. Pederson, #459503**, who is assigned to the Sheriff's Department, Community Oriented Policing Bureau, HIT Team, stationed out of Lancaster Station. Deputy Pederson has been a Deputy Sheriff since 02/23/1999 and has been working her current assignment for approximately three years. Deputy Pederson was wearing a standard Class B uniform. Present with Deputy Pederson, was her attorney, Adam Marangell. The interview was recorded and the following is a summary of the statement.

Deputy Pederson said she and her partner, Deputy Conley went to 43263 18th Street West, in search of a wanted parolee at large, felony suspect. She went to the location with a team of three other uniformed deputies. Pederson and Conley were assigned to and went to the rear of the residence, in order to take a containment position. They made their way to the rear, via the south side of the property. Pederson told Investigators, while in the rear yard, she and Conley were tasked to check and clear, out buildings or structures in the backyard. She said, she received information that person(s) were known to loiter or stay on the property.

* * *

BY: SERGEANT MARTIN L. RODRIGUEZ, #201743

SERGEANT ROBERT J. GRAY, #400799

APPROVED BY: LIEUTENANT MIKE ROSSON, #213563
HOMICIDE BUREAU – DETECTIVE DIVISION

Mendez v. County of Los Angeles

Interview with Sgt. Greg Minster at Lancaster Station 100110

Gray	On tape, October 1st, 2010. It's uh, 2122 hours. We're at Lancaster Station, conference room. My name is Sergeant Robert Gray. My partner is Sergeant Marty Rodriguez. We're both from Sheriff's Homicide and we're here with Sergeant Greg Minster of Lancaster Station. Hey Greg, what's your employee numbers?
Minster	277205.
Gray	And uh, how long you been a police officer, Greg?
Minster	20, 21 years.
Gray	21 years. You remember your hire date by any chance?
Minster	Uh, December, it was December 4, 1988.
Gray	December 4, 1988. Alright. Um, let's see. After the Academy, what, where did you get assigned to?
Minster	Uh, East Facility.

Gray	So PDC East. How long were you there for?
Minster	Uh, I was there for a couple years, went to NCCF and when it closed I went back, so my custody experience was like five years.
Gray	About five years in custody.
Minster	Yeah, between East and NCCF for like 8 months. They were redoing the inside of East.
Gray	And then uh, from there where did you go?
Minster	I came out to old [inaudible] Valley Station.
Gray	... station
Minster	I got assigned to Palmdale after training, I went through six months.
Gray	So that was back with the one station but two different areas.
Minster	Yes.

* * *

Minster	Yes Sir.
Rodriguez	And that was at the dog, and nowhere in the vicinity of the shed?
Minster	No. he fired down to his right, down at the dog, the dog was probably two feet or so and I was right to the right of Deputy Cox. He fired that one round and I could actually feel the blast. The dog went down and we just went past him. No other rounds were fired after that, that I heard.
Gray	I was gonna ask you, um, you went, you said that, we took a video and you saw a gun, prior to the video, when the, when you see the suspect in the shed, when, if at all do you see any type of weapon in the shed.
Minster	Not until he moves forward and lays down.
Gray	So when he exits the shed.
Minster	Yes.
Gray	It's kind of like uh, can you describe it.
Minster	Oh man. Uh, it's like uh.

Gray	Plywood ....
Minster	Plywood, yeah, but a little storage thing you keep a lawnmower in, lawn equipment.
Gray	I gotcha. Nothing that would be construed as living quarters.
Minster	Absolutely not. It would be for equipment or a place for somebody to hide, not a place that somebody would inhabit.
Gray	So as he exits and looks to the ground, do you see some type of weapon or anything?
Minster	Yeah, there was a um, it was a rifle, um, the barrel was pointing towards the west, the butt was towards the east, but the butt was sawed off or it was missing.
Gray	Okay, so void of the, void of the stocks?
Minster	Yeah.
Gray	Anything else for you? Cool, thanks a lot man. Let me go off tape here. It's gonna be 2138. Off tape.

Exhibit No. 107
Sheriff Department Investigation Notes

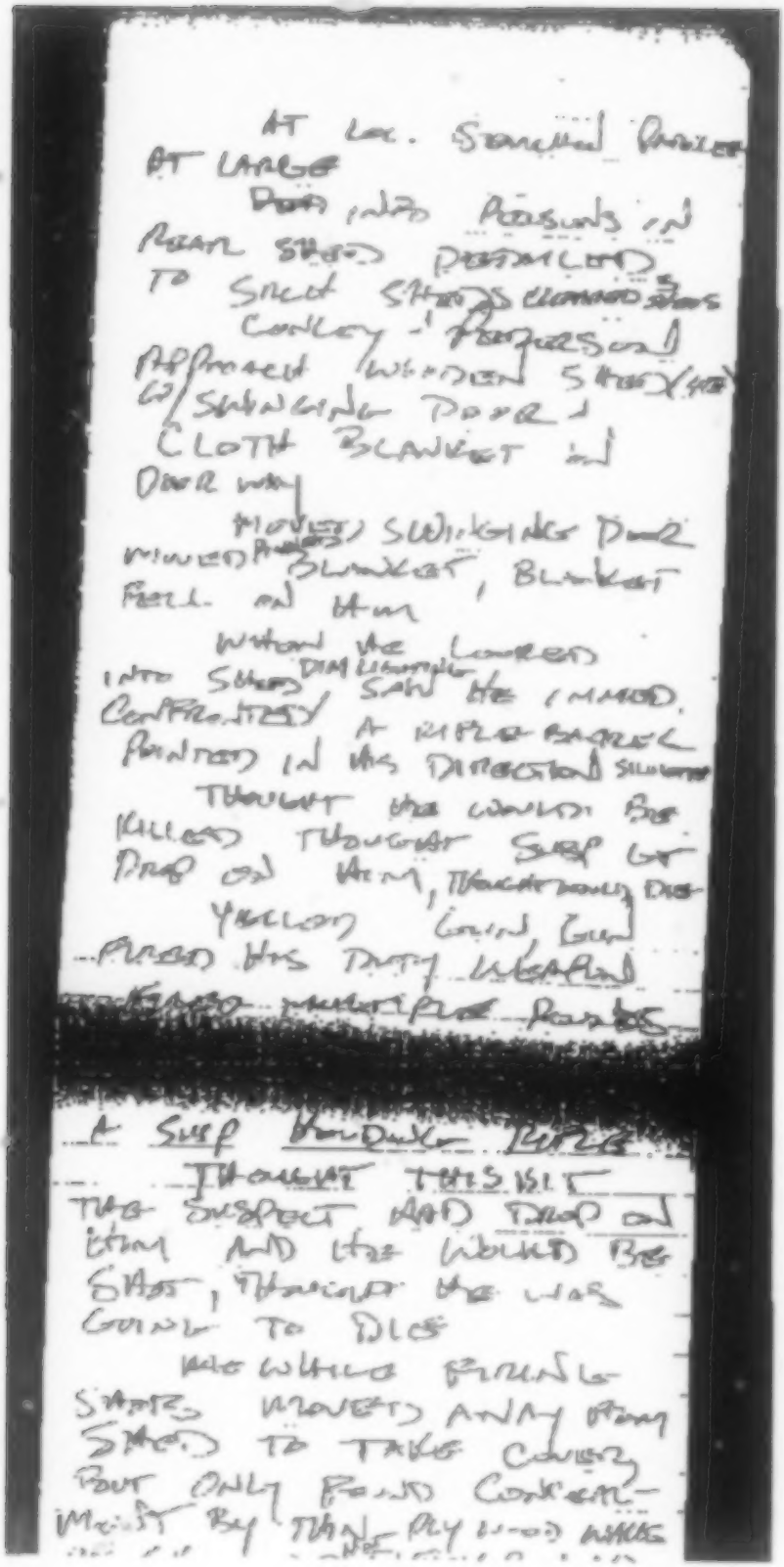
Date 19 OCT 1 C Day FRI Time 1430
Arrival 1630 Weather ____ Lighting DAYLIGHT
Station LANCASTER STN
File # 010-21291-1126-055
Loc. 43263 18TH ST. WEST
Victim DEP. CHRISTOPHER R. CONLEY 519471
DEP. JENNIFER M. PEDERSON 489503

Classification D.I.S.
Suspect MENDEZ, ANGEL MICHAEL
MH/H-9-83

Handling unit ____

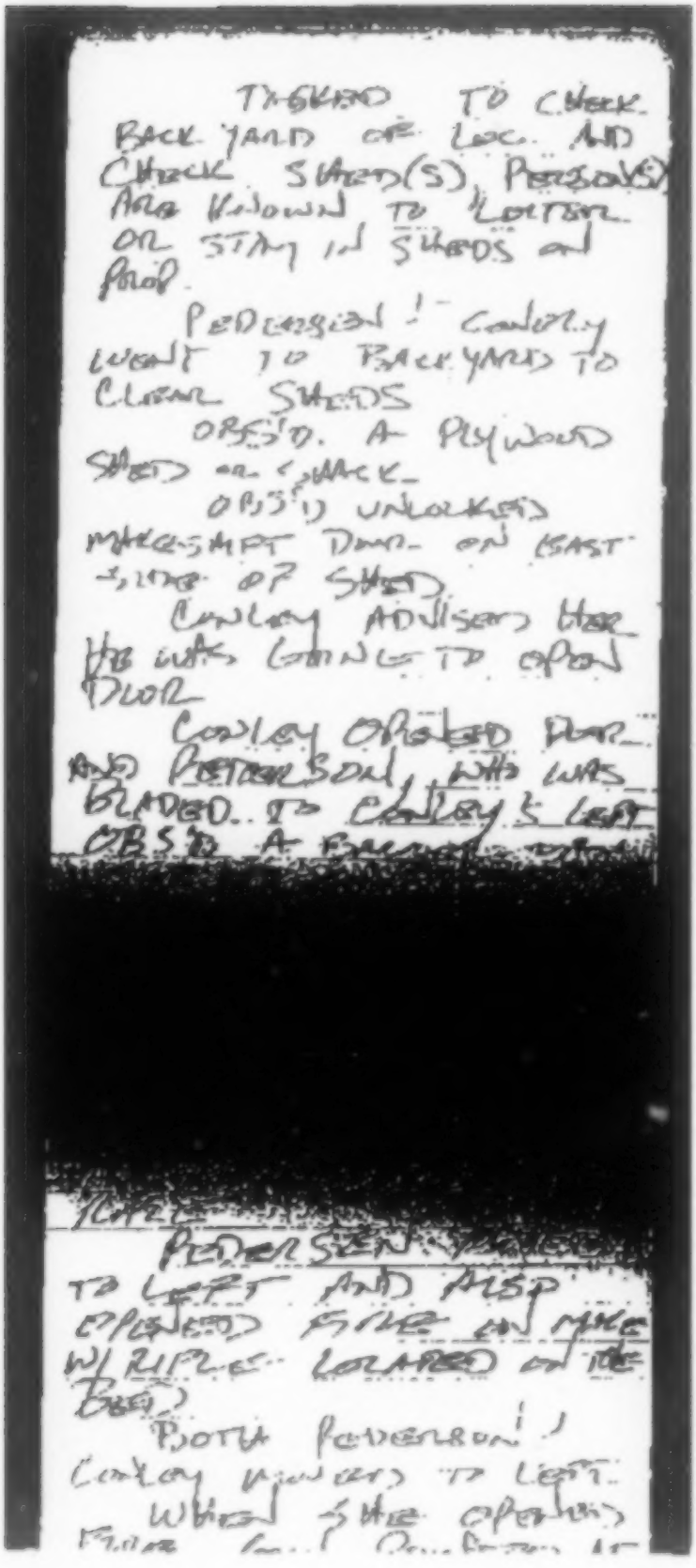
Pronounced by ____ Time ____
Dep. Cor. ____
C.C.# ____
Temperature: Envir. ____ Liver ____
N.O.K. ____

Inv. M.L. RODRIGUEZ R. GRAY
Inv. GUZMAN / DUNCAN
Lt. SLAWSON



AT Loc. STANDING PARKED
AT LARGE
DOOR INTO ROOMS IN
REAR SHED PERSON LOOKED
TO SIDE SAW CLOTHED STAND
CONLEY - PERSON
APPROACHED WOODEN SHED (HE)
W/ SWINGING DOOR
CLOTH BLANKET IN
DOOR WAY
MOVED SWINGING DOOR
MOVED BLANKET, BLANKET
FELL AS HE
WATCH THE LOOKED
INTO SHED SAW HE (MAN)
CONFRONTED A RIFLE BARREL
POINTED IN HIS DIRECTION
THOUGHT HE COULD BE
KILLED THOUGHT SHOT OF
DRAG OUT HIM, THOUGHT DIE
YELLOW LOUD, GUN
FIRED HIS DUTY WEAPON
[illegible]

A SHOT RANG OUT
THOUGHT THIS IS IT
THE SUSPECT HAD DRAG OUT
HIM AND HE WOULD BE
SHOT, THOUGHT HE WAS
GOING TO DIE
HE WHILE FRIENDS
SHOTS MOVED AWAY FROM
SHED TO TAKE COVER
BUT ONLY FOUND CONCEAL-
MENT BY THAT PLY-WOOD [illegible]



TASKED TO CHECK
BACK YARD OF LOC. AND
CHECK SHED(S), PERSONS
ARE KNOWN TO LOITER
OR STAY IN SHEDS on
PROP.

PEDERSEN: Conley
WENT TO BACKYARD TO
CLEAR SHEDS

OBS'D. A PLYWOOD
SHED on BACK

OBS'D UNLOCKED
MAKESHIFT DOOR on EAST
SIDE OF SHED

Conley ADVISED HER
HE WAS GOING TO OPEN
DOOR

Conley OPENED DOOR
AND PEDERSEN, WHO WAS
BLINDED. P to Conley's LEFT
OBS'D A

PEDERSEN MOVED
TO LEFT AND ASSD
OPENED FIRE on MAKE
W/ RIFLE LOCATED on THE
BED

BOTH PEDERSEN &
Conley MOVED TO LEFT.
WHILE SHE OPENED
FIRE [illegible]

Antelope Valley Life Crime Watch
Day to Day Living in the Antelope Valley

Sheriff LeRoy Baca

Crime Watch

Lancaster Sheriff Station Detectives Need Community Assistance

By Tom Bryant

Lancaster – Detectives at the Lancaster Sheriff's station are seeking the public's help in locating Ronnie Lee Odell. Odell is a parolee at large and considered armed and dangerous.

Lancaster Sheriff's Department spokesperson Deputy Mike Faust is asking the public's help in locating Odell who is believed to be in the Antelope Valley.

Odell is wanted on numerous charges including child endangerment, felony evading, possession of a controlled substance, possession of marijuana and possession of a stolen vehicle.

Odell is described as a white male, 6 feet 2 inches tall and 190 pounds. Odell was born on December 8, 1979 and is 30 years of age.

If you have seen Ronnie Lee Odell or know of his whereabouts, contact the Los Angeles County Sheriff's office at (661) 948-8466, or your local law enforcement agency.

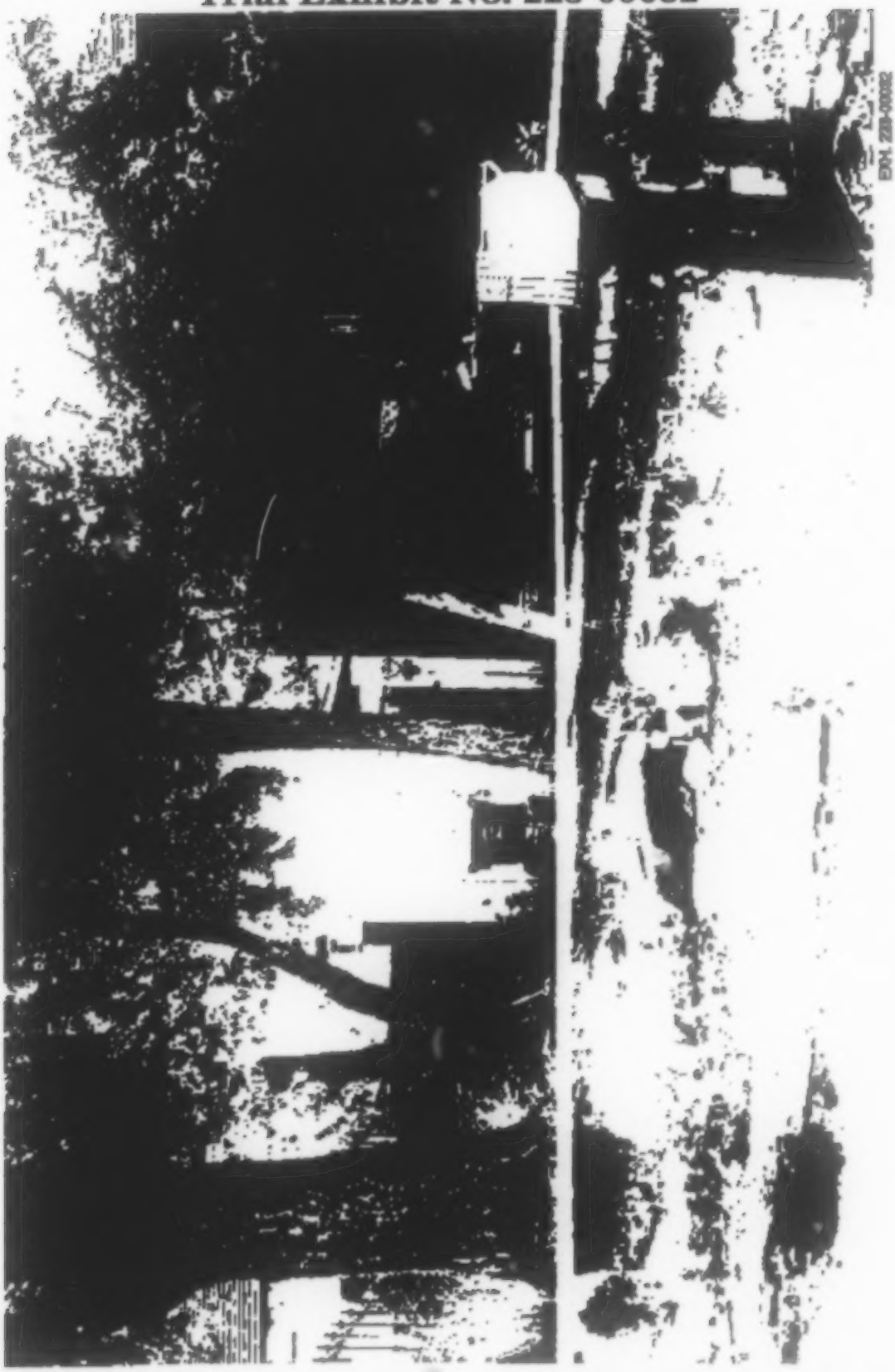
Ronnie Lee Odell

LASD

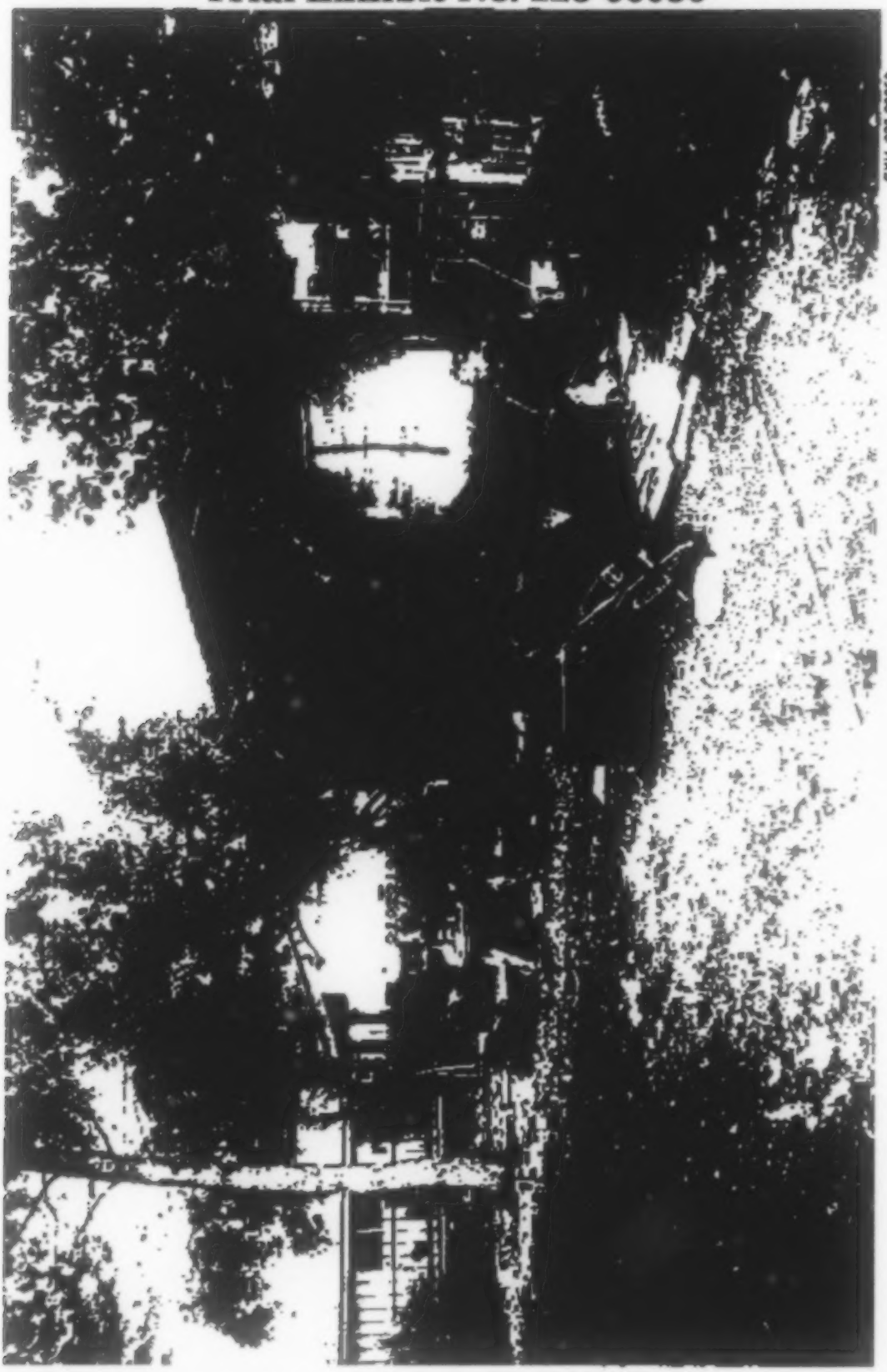
12/28/2010

Trial Exhibit No. 223-00029

Trial Exhibit No. 223-00032

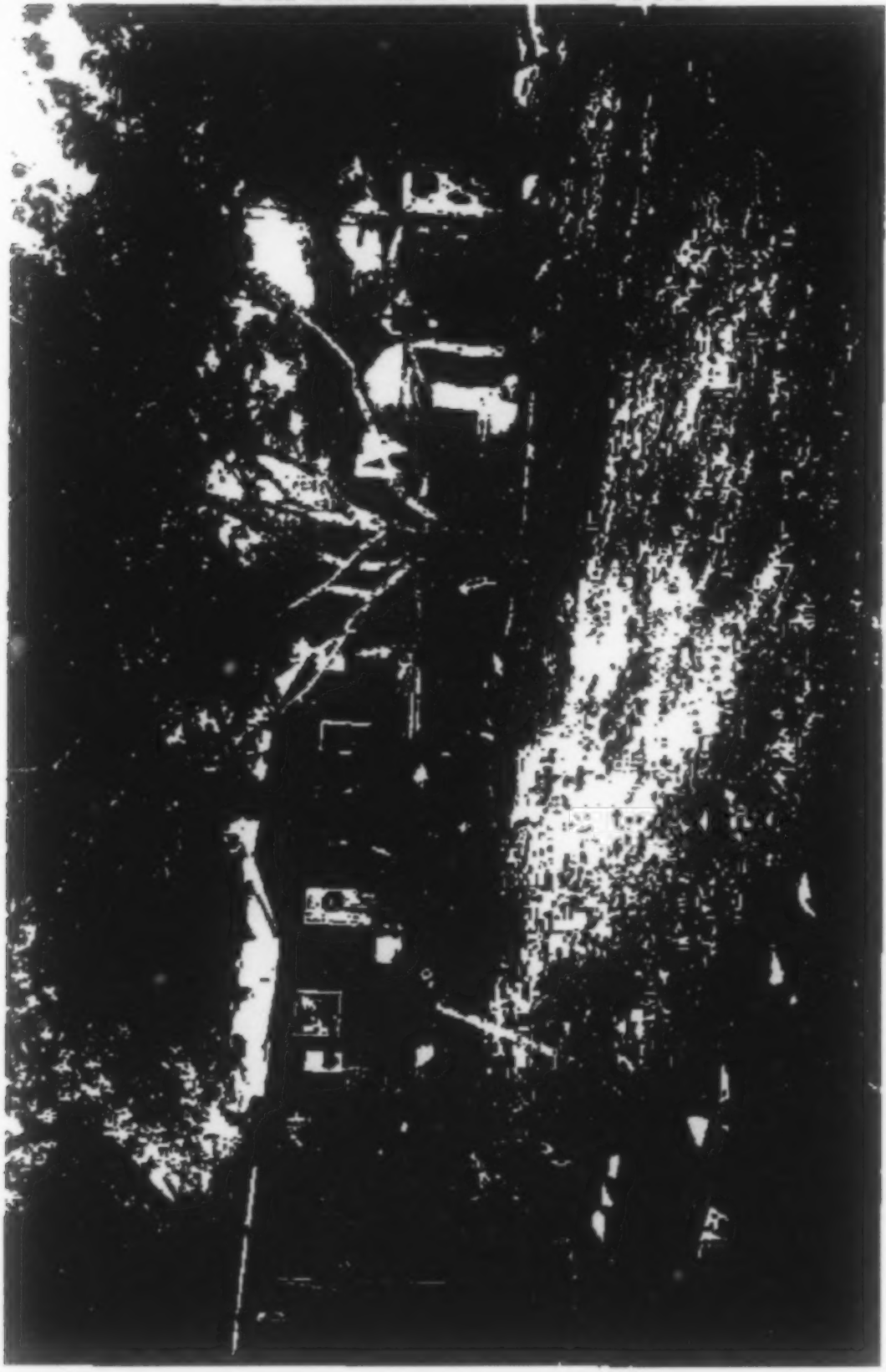


Trial Exhibit No. 223-00050



Trial Exhibit No. 223-00062

Trial Exhibit No. 223-00067



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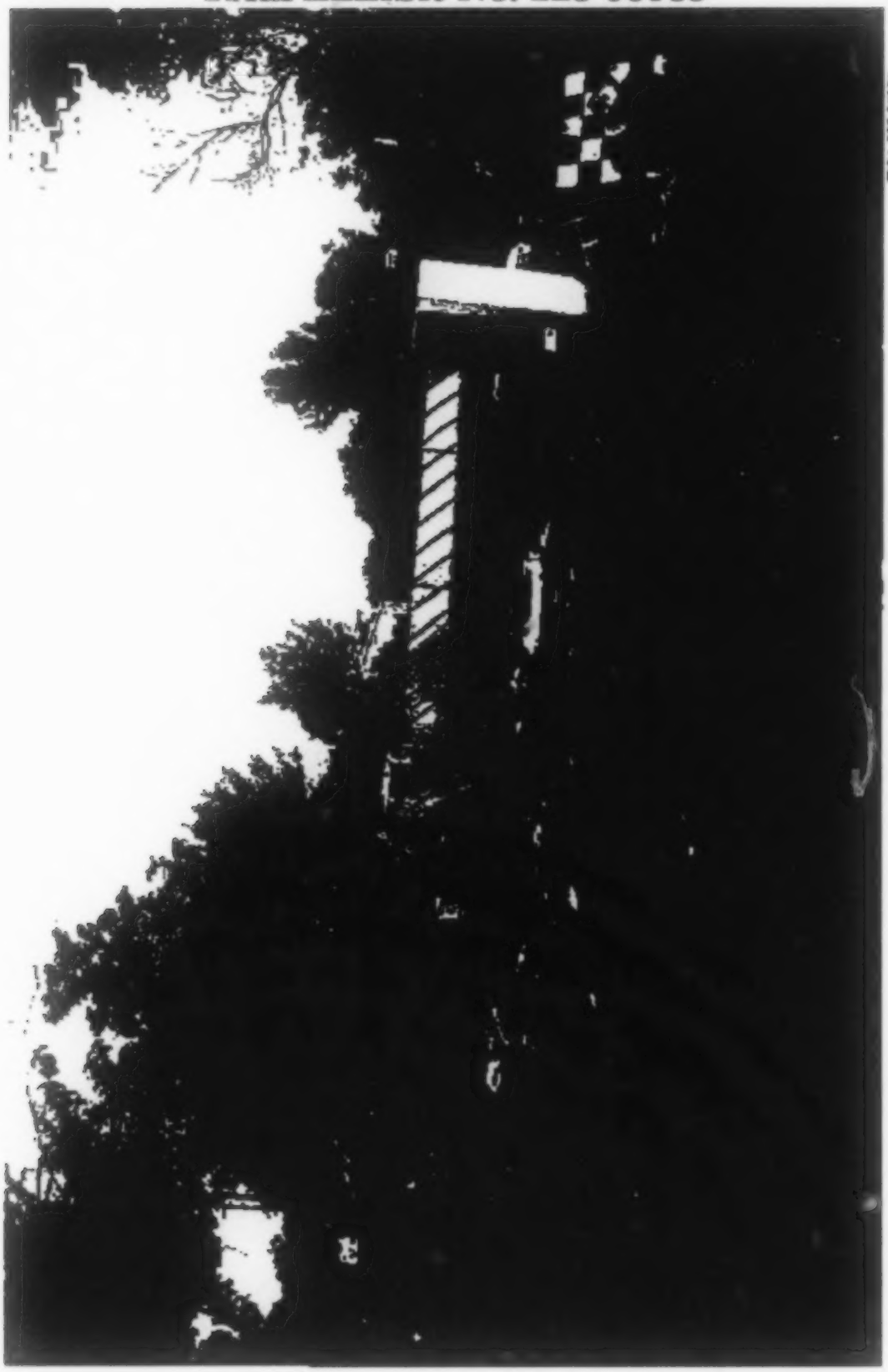

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Trial Exhibit No. 223-00086

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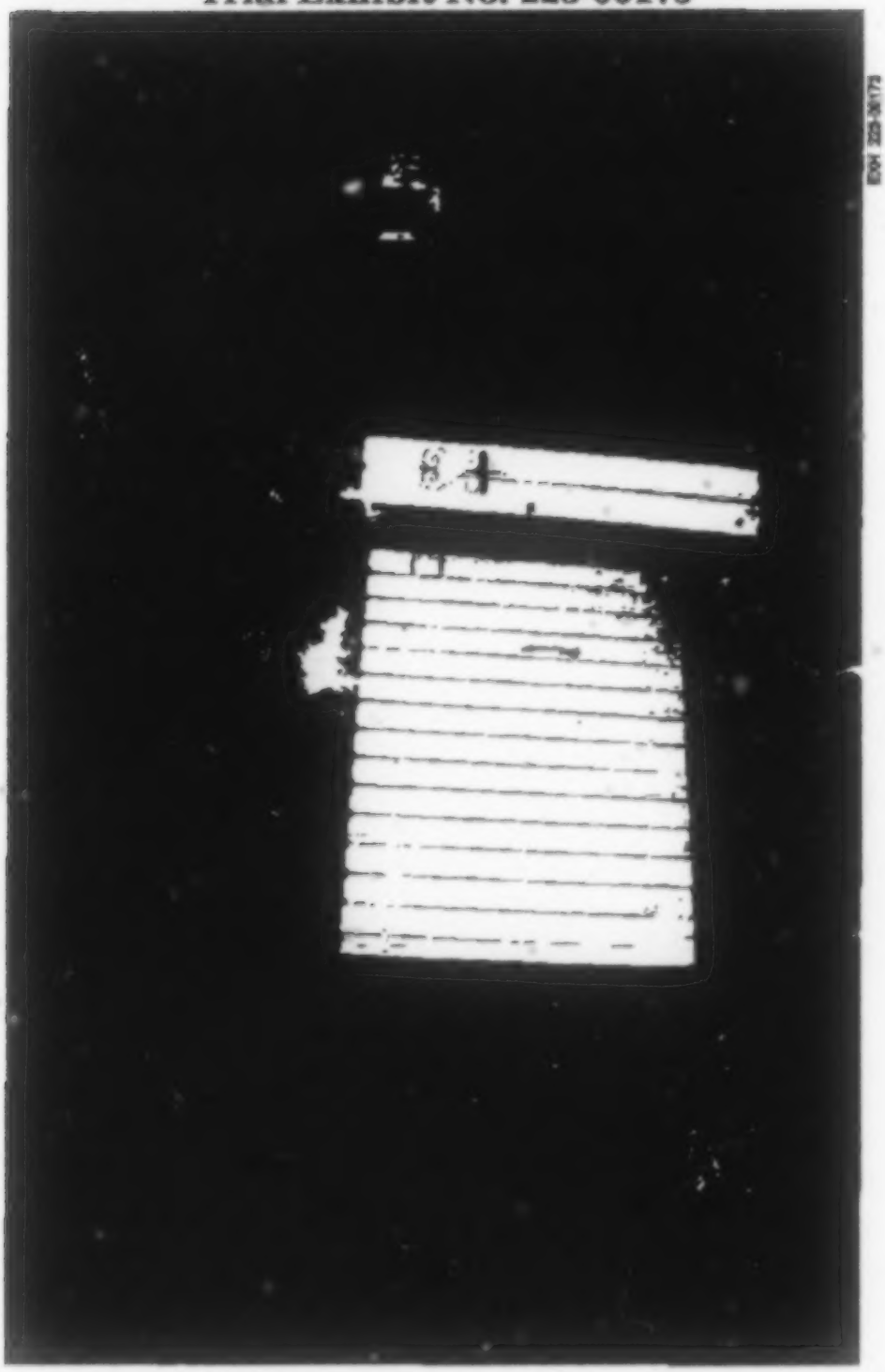

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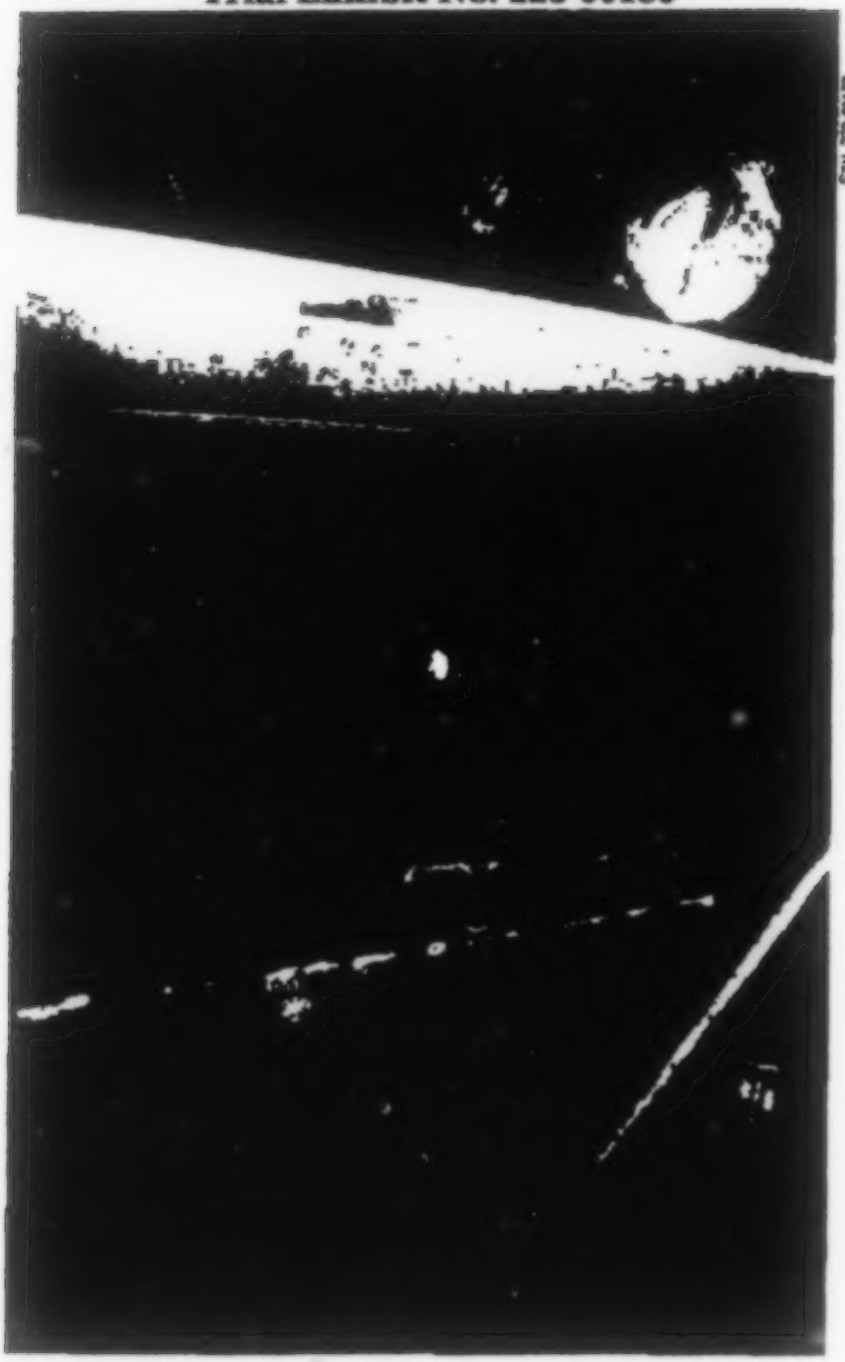

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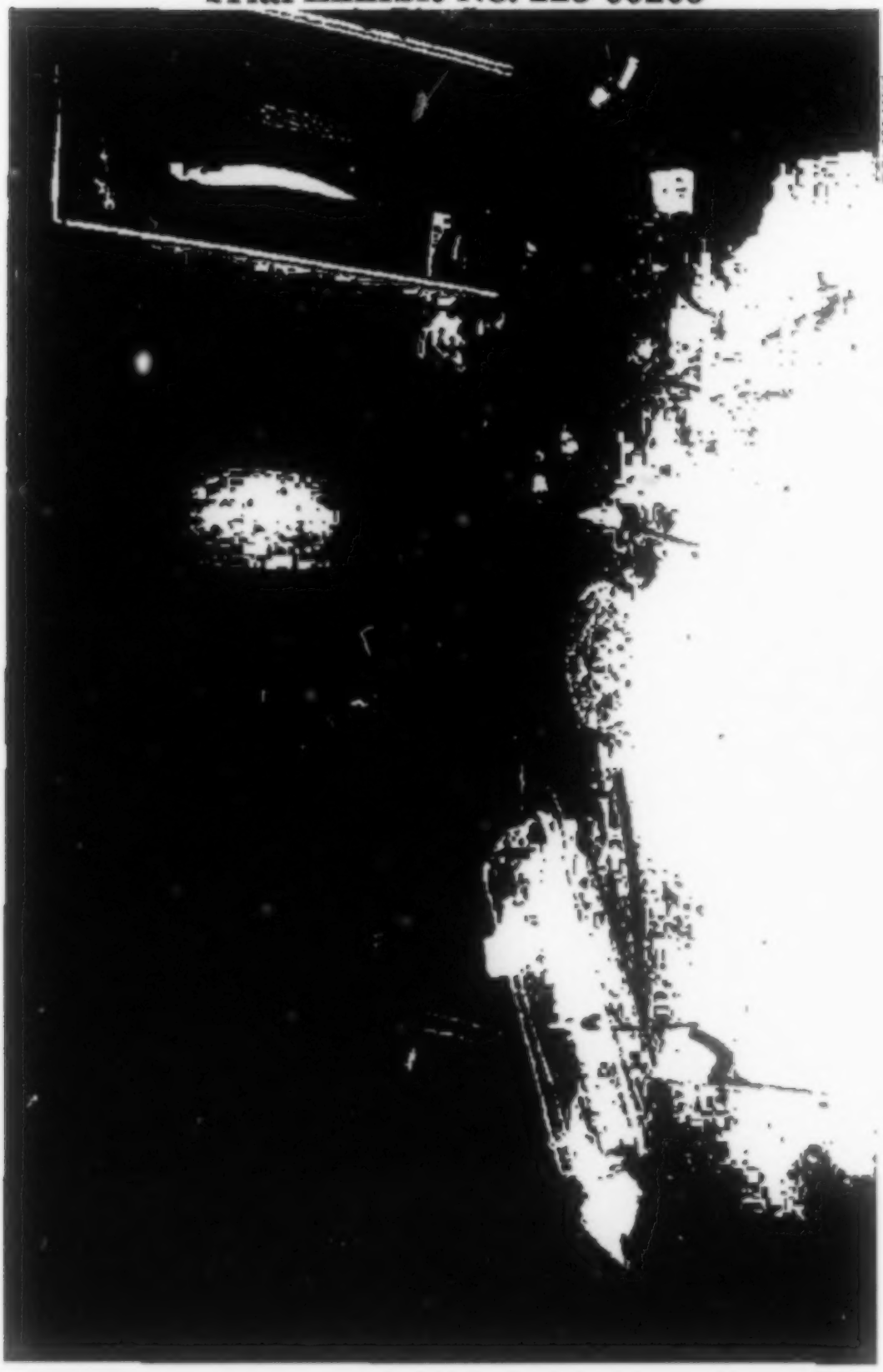

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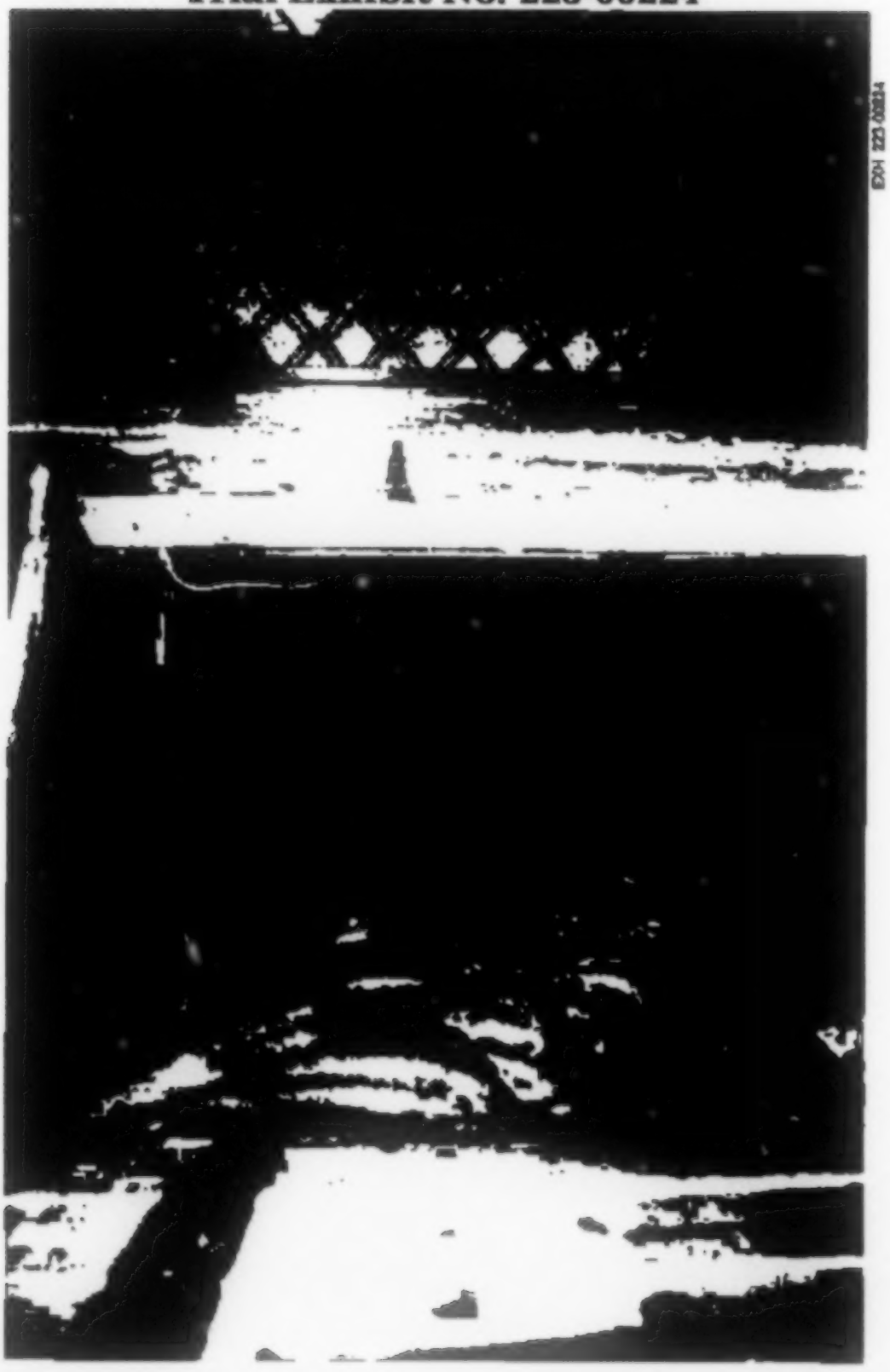

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Trial Exhibit No. 223-00251

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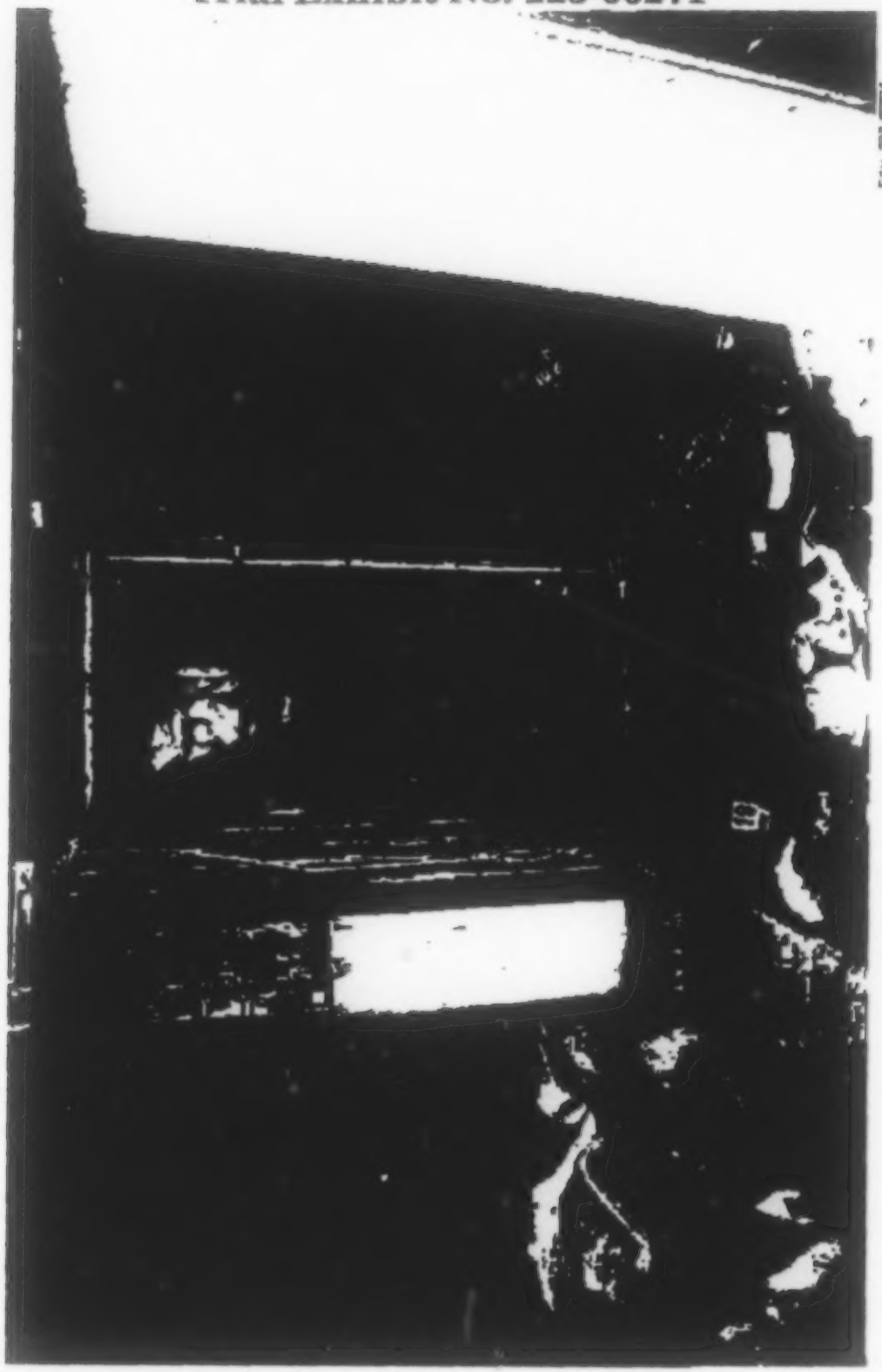

Trial Exhibit No. 223-00275

LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT

Executive Force Review
Leadership and Training Division

FILE # SH2274774 COPS

EFR Scheduled: 10-6-2011

EFRC Received: 5-10-2011

Incident Date: 10-1-2010

HB Date: 1-31-2011

One Year Date: 1-30-2012

Station/ Unit: COPS BUREAU

Investigator: Kim/ Ault

CONFIDENTIAL

UNIT COMMANDER RESPONSE

1. Complete the form including the following signatures:

a. All involved personnel

b. Supervisors who advised involved deputies of these findings

c. Unit commander

2. If training was order for involved personnel, see "Training Attended" section.

3. Return this form to the Executive Force Review Committee sergeant at IAB

Incident Date:	October 1, 2010	**Action Taken by Unit** (briefing, counselling, training, etc.)
Unit:	COPS Bureau	
Incident:	Hit Shooting	
File #:	SH2274774	**SEE ATTACHED MEMO.**
EFRC Date:	October 6, 2011	

The result of the Executive Force Review Committee's review of the above listed case was discussed with me.

/s/	Jennifer Pederson	10/11/11	/s/
Signature	*Print Name*	*Date*	*Supervisor's Signature*
/s/	Christopher Conley	10/11/11	/s/
Signature	*Print Name*	*Date*	*Supervisor's Signature*

Unit Commander's Signature:	/s/	Date: 10/12/2011

Deputy Christopher R. Conley # 519471
Deputy Jennifer M. Pederson #459503

COUNTY OF LOS ANGELES
SHERIFF'S DEPARTMENT
"A Tradition of Service Since 1850"

OFFICE CORRESPONDENCE

DATE:
October 12, 2011

FILE:
SH2274774

FROM: ROBERT J. TUBBS, CAPTAIN COPS

TO: JOSEPH S. HARTSHORNE, COMMANDER OFFICE OF THE UNDERSHERIFF

SUBJECT: **UNIT COMMANDER RESPONSE**

The purpose of this memo is to document the use of force de-brief held with Deputies Christopher R. Conley, #519471, and Jennifer M. Pederson, #459503, regarding the "hit shooting" that occurred on October 1, 2010.

On October 12, 2011, Lieutenant John Voza met with Deputies Conley and Pederson to discuss the findings of the Executive Force Review Committee. He de-briefed the Committee's findings with the deputies as well as the Committee's recommendations.

In addition to the de-brief, Deputy Conley and Pederson have been scheduled to attend "Tactics II" training at Laser Village on October 26, 2011. This

training will include a review of the incident with Sergeant Michael Harding.

During the next several weeks, COPS Bureau will also be conducting Bureau wide training regarding the gathering of tactical information prior to searching an area, as well as discussing the legal aspects of entering an inhabited dwelling.

IAB SH2274774
HOMICIDE INTERVIEW
DEPUTY CHRISTOPHER CONLEY

Gray: It's October 1st, 2010. It's 1930 hours. We are in the Conference Room in Lancaster Sheriff's Station. My name is Sergeant Robert Gray, my partner is Sergeant Marty Rodriguez. This is an interview with Deputy Christopher Conley, also present is Mitch Kander, attorney from Green & Shinee. He represents Deputy Conley. How you doing Chris?

* * *

Gray: How long were you at North?

Conley: Five and a half, six months.

Gray: Then at Palmdale?

Conley: About three years.

Gray: And then you went to COPS right?

Conley: Yes, sir.

Gray: Is it, was it Regional COPS or Lancaster or how do they, how do they classify it?

Conley: Well, it's COPS Bureau, Lancaster HIT Team.

Gray: Lancaster HIT Team, okay.

Rodriguez: When were you assigned there?

Conley: February of this year.

Gray: All right, and just looking at your uniform right now, I see you're wearing Class B long sleeve?

Conley: Yes, sir.

Gray: And you have a nylon webgear gun belt right?

Conley: Yes, sir.

Gray: And some black boots. So I see your, your badge, cloth badge visible on your left chest and Sheriff patches clearly visible on both shoulders.

Conley: Yes, sir.

Gray: Name tag above the right pocket of your shirt. Okay. I guess we can jump right into it.

Rodriguez: Well, did you have, I notice you're not wearing a vest, did you have a green, when the shooting occurred, you were wearing this vest cover...

Conley: Yes, sir.

Rodriguez: ...that we're looking at here, which is a green vest cover?

Gray: It is a green vest cover, it's got on the right chest there is an American flag, underneath that there is block letters it says Sheriff and underneath that is a name tag reads Conley. On the left chest there is a visible L.A. Sheriffs badge. On the back in very large block letters is the word Sheriff very clearly stated. Like I said, it's green in color and it's made out of cloth and I believe a ballistic vest is tucked inside the outer vest. All right, Chris if you would, if you would explain what happened today from the point where you end up getting involved.

Conley: We're at the location looking for a parolee at large and our detail was we received information that there were sheds in the back yard and that someone might be staying in one of the sheds. Our detail was to clear the sheds, make sure they were safe. We looked in the first three, cleared those, those were fine. They were full of miscellaneous items. No people. The last shed we went to was the one furthest west on the property and as I was looking through it had a wood slated door with, it was hinged, no door handles, no locks and it was free swinging and as I went to clear that, I pulled the door open a little bit towards me so I could see and gain visibility of the shed and at which point a rifle barrel was pointed in my face. My firearm was

already in my hand I discharged my firearm several times as I backed away from the shed. I could, I could tell there were people inside or a person inside later I saw there was two, initially I only saw the, the silhouette of a guy holding the rifle. And I made verbal commands for him to come out once he started talking to me.

Gray: So when you, when you opened the door and you see this rifle barrel pointed at your face, what, what are you feeling at that time?

Conley: Well, I thought, I thought that was the end. I thought he got the jump on me and that's the end of it, I lose. And I thought I was gonna die. So, I reacted to it by firing once, once I kind of like had the wherewith all, I kind of realized what was going on and I reacted by firing my duty weapon.

Gray: And was this an attempt to, 'cause you said you thought you were going to die, is this, was this an attempt to save your life?

Conley: Yes. I didn't want to get shot and I figured if I had the chance, you know.

Gray: Right.

Rodriguez: Did you verbalize anything when you, when you see the rifle and I can only imagine that it's very frightening and happening very quick, but did you verbalize anything, like saying, "Gun! Gun!"

Conley: I said, "Gun!" to notify my partner that there was a firearm.

Rodriguez: Oh, you did, okay.

Conley: And, and I mean I opened the door there was a, there was a barrel in my face, I said, "Gun!" and I started firing and backing away almost like instinct just a reaction.

Gray: Now, you described the door as a swinging door and a curtain or something or ...?

Conley: The, swinging door behind ...

Gray: I have a diagram right here of the yard if that helps you out at all. So this would be the street, this would be 18th Street West right here where I'm pointing and this would be on the north would be up over here on the side yard.

Conley: Yes. As I, I, we rounded the shed I guess it would be on the ...

Gray: This would be the shed roof.

Conley: ...on the north side of it and we came up on it this way as I, I opened the door there was a blanket hanging ....

Rodriguez: And by door, what is the composition of the door as you recall?

Conley: The best way I can describe it is like an old western outhouse with the wood slates, you know with the moon carved into it, like a makeshift door.

Rodriguez: And it's not locked so it's just a ...

Conley: No, free swinging.

Rodriguez: Free swinging.

Conley: You just push it right open as if like to the kitchen in a restaurant. As I open that there was a blanket pinned ....

Rodriguez: Okay, a blanket.

Conley: Somehow affixed to the doorjamb and it was drawn back at the bottom, much like the curtain, so it kind of made a V shape between the doorjamb and the blanket.

Gray: A V shape that you could kind of see into the ...?

Conley: See into the interior but it was dark in there and there was no lighting so as, as I peeked in there the barrel came down

in my face and it was approximately a foot to two feet away from my face. Like I said, I, I said gun, I yelled gun for my partner to know that there was a threat and then I fired at the suspect.

Rodriguez: Prior to approaching I think you said you maybe searched another shed prior to that shed or, or was that the first shed that you came upon?

Conley: No, there were on the I guess it would be the south side of the house. There were more, there were sheds in between.

Rodriguez: Do you recall hearing other deputies or yourself identifying themselves as, as on the property? You know Sheriff's Department or anything like that? Do you recall that?

Conley: I remember hearing them saying something but I don't remember what it was.

Rodriguez: And as you approached there, do you recall, you or your partner identifying yourselves?

Conley: No, I didn't identify myself.

SH2274474

WITNESS INTERVIEW

DEPUTY CHRISTOPHER CONLEY

Kim: Today's date is April 19th, 2011. The time is 10:25 AM. I'm Sergeant Patrick Kim and with me is Sergeant Chad Smeltzer of the Internal Affairs Bureau, commanded by Captain Joseph Gooden. This is a witness interview with Deputy Christopher Conley, regarding IAB case number 2274774, which involved an on duty, deputy involved shooting, in the Lancaster Station patrol area on October 1, 2010. This interview is taking place at IAB in interview room D.

* * *

Conley: Yes sir.

Kim: How much time passed between the time you arrived at the location and the time the shooting actually occurred?

Conley: I would –

Kander: You can give an estimate.

Conley: I would say anywhere between five to fifteen minutes.

Kim: How far away from you, how far away were you from the suspect when you first saw him?

Conley: Two to four feet.

Kim: What was the lighting inside the shed?

Conley: There were no lights on in the shed.

Kim: Was there a window in the shed?

Conley: Not that I recall.

Kim: How much time passed between the time that you saw the suspect and the time you fired your weapon?

Conley: Maybe fifteen seconds.

Kim: Describe your visibility of the suspect.

Conley: He was only lit by the daylight from outside as I opened the door, and I could see his, basically the silhouette and as, I could see the rifle of the barrel was clear, because it was more, it was closer to me and more in the daylight.

Kander: I think you mean barrel of the rifle?

Conley: Yeah, the barrel of the rifle, and then as, as you know, I could see that the barrel of the rifle and then a silhouette of the

man holding it, but I couldn't actually make out any of the facial features of him or anything like that.

Kim: Did you use a flashlight?

Conley: I did, I have the flashlight mounted on my gun and, but it happened so fast. I couldn't you know, I wasn't paying attention if it was illuminating the shed or not.

Kim: What was the suspect doing when you first saw him?

Conley: As I opened the door, it, he was holding the rifle.

Kim: Was he in a seated position or a laying position, or standing position?

Conley: I want to say he was seated on whatever piece of furniture that they had in the shed. I think it was a bed.

Kim: Describe the weapon that you saw him holding.

Conley: I recognized it as a rifle.

Kim: How was he holding the rifle?

Conley: With, I want to say, his right hand. I don't, I couldn't, I can't remember and I

didn't notice at the time if he had his left hand on the stock or not.

Kim: Where was the barrel pointing?

Conley: At my face.

Kim: Did the suspect say anything as he was holding the rifle and you saw him?

Conley: No sir.

Kim: Did the suspect fire the rifle?

Conley: No sir.

Kim: Did you consider setting up a containment?

Conley: No sir.

Kim: Did you have concealment?

IAB SH2274774

HOMICIDE INTERVIEW

DEPUTY JENNIFER PEDERSON

Gray: All right, it's October 1st, 2010. The time is 2004. We're here at Lancaster Station in the conference room. My name is Sergeant Robert Gray and my partner is Sergeant Martin Rodriguez from Sheriff's Homicide. We're here to interview Jennifer Conley, Deputy....

* * *

Rodriguez: Three years ago?

Pederson: Yes. So '08, '07.

Gray: And then I'm just going to go over your uniform and this is what you were wearing when the, when the shooting occurred?

Pederson: Yes.

Gray: I see you have a short sleeve Class B uniform with visible Sheriff's cloth badge on your left chest on, above the right pocket is your name tag. You have two L.A. County Sheriff patches, one on each shoulder and then there's two stripes underneath each patch. Okay,

and I notice you have a vest inside. So you weren't wearing a vest cover, you were wearing exactly this tan shirt and the green Class B uniform.

Pederson: Yes.

Gray: And I also notice you have a leather web belt, or leather Sally Brown?

Pederson: Yes.

Gray: Standard Sally Brown with the regular attached handcuffs and magazine pouch, holster and all that.

Rodriguez: Jennifer, what's your hire date, do you remember your hire date?

Pederson: 2/23/99.

Gray: So, today we're here to talk about this shooting that happened on 18th Street West. Could you tell us about your involvement and when you got involved and how everything went down?

Pederson: We were involved with another team here from Lancaster. They were looking for a parolee at large. They thought he was in a particular grocery store initially. He wasn't, so they decided to check two secondary locations, one of which his father resided at and the

second was the location he frequented or hung out in. I was tasked to go to the second location which would be the one he frequents or could possibly be hanging out in. My partner and I were asked to check the backyard because there was a shed back there and the other deputies from the other team advised that sometimes people stay in that shed or hang out in that shed. So that's what we did, we went directly to the back of the house, to the yard.

Gray: And you're checking to look for this PAL?

Pederson: Yes.

Gray: Got you. Who is the ...so it's you and who goes in the backyard with you?

Pederson: Deputy Conley.

Gray: Deputy Conley and he's your partner, regular partner?

Pederson: Yes.

Gray: And then who were the other deputies? You said they were from another team?

Pederson: They were from the LANCAP team, which is a team from the station.

Gray: So that's Lancaster station team, not affiliated with COPS?

Pederson: No, not affiliated with COPS.

Gray: Gotcha. Do you remember the deputies' names that were part of that?

Pederson: Sergeant Minster was one of them and Deputy Billy Cox was another and I don't recall anybody else at that point 'cause we went to the back.

Gray: And when you went to the back, which way did you go? Because I know there's a ...well let me ...we have a little diagram here, so I don't know if you can see it, this is 18th Street West right here, which would be the top page, top of the page and then there's an arrow on 18th Street West and that's going to be pointing north. So which way did you guys approach the backyard?

Pederson: We came westbound along the side of the house. In through the, the fence that was open, this area here is open. So there's an open gate on the west side of the house.

Gray: Right, so the gate would be right here.

* * *

Pederson: So we came diagonally towards the door. We could see there was a, a little wood door. It wasn't locked, there was no locking mechanism.

Gray: So it's void of any latch or handle or anything like that?

Pederson: Yes. It was like a press wood door. Just board, basically. So my partner and I approached it and he basically let me know he was going to open it without speaking, just so that I knew what he was going to do. Do you want me to go into which way the door opened or does that matter?

Gray: Well, what did you see? Whatever you saw.

Pederson: He, okay, he, he opened the door and as soon as that door came open, I could see the barrel of a rifle pointed at him around the center mass and he yelled, "Gun!" and started to shoot towards the man holding the rifle. At that point I bladed myself to his left, my partner's left, and began to fire as well and I could see the man laying in the bed with the rifle pointed in our direction.

Gray: So you're, you're on his left at this point?

Pederson: Yes.

Gray: You're to the left of him?

Pederson: To the left of Conley, yes. And once the shooting began, that would be he and I, we bladed off to the left side of the shed.

Gray: So once he opens this door and also now you see this barrel of a rifle, what's going through your head?

Pederson: What's going through my head is that there's a gun pointed at myself and my partner and that this guy does not want us anywhere near him and he will shoot us to kill us to get us away from him and I'm not going to let that happen.

Gray: So are you, are you at that time, are you fearful? I mean you see this rifle, are you scared at all?

Pederson: No. No.

Rodriguez: You had a fear for your own life and your partner's life.

Pederson: Well, mine and my partner, absolutely. I'm sorry, yes, I was afraid actually for my partner almost before I even thought of myself. I didn't want him to get shot so ....

Gray: So now do you believe this person is going to shoot you?

Pederson: Yes, absolutely.

Gray: And so you fire some rounds and, and correct me if I'm wrong, but is this to protect yourself and your partner?

Pederson: Yes.

Gray: And do you guys at that, at that point when the shooting stops, what happens then?

Pederson: The shooting stopped and we ... I could see him stand up, the, the suspect. He didn't have anything in his hands anymore and he was yelling, "I'm sorry. It was a BB gun. I'm sorry." And we ordered him out, to walk forward out of that doorway.

Gray: And did he do so?

Pederson: Yes.

Gray: And then was anybody else in the shed?

Pederson: Yes.

Gray: Who was that?

Pederson: There was a female who had been laying behind him on the bed.

Gray: And did she eventually ... does she come out on her own or did you guys order her out or ...?

Pederson: We ordered ... after he came out, we ordered her out and she complied and came out.

SW NO._____

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES

SEARCH WARRANT AND AFFIDAVIT

(AFFIDAVIT)

Detective Mark Donnel swears under oath that the facts expressed by him/her in this Search Warrant and Affidavit and the attached and incorporated **statement of probable cause** are true and that based thereon he/she has probable cause to believe and does believe that the property and/or person described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

HOBBS	YES [ ]
SEALING	NO [ ]
REQUESTED:	
NIGHT	YES [ ]
SEARCH	NO [ ]
REQUESTED:	

_____/s/_____

(Signature of Affiant)

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICE OFFICER OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES: proof by affidavit having been made before me by:_Det. Mark Donnel_

(Name of Affiant)

that there is probable cause to believe that the property and/or person described herein may be found

at the locations set forth herein and is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "X" (s) in that:

[ ] it was stolen or embezzled;
[X] it was used as the means of committing a felony;
[ ] it is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom her or she may have delivered it for the purpose of concealing it or preventing its discovery;
[X] it tends to show that a felony has been committed or that a particular person has committed a felony;
[ ] it tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3 or depiction of sexual conduct of a person under 18 years, in violation of Section 311.11, has occurred or is occurring;
[ ] there is a warrant for the persons arrest;

YOU ARE THEREFORE COMMANDED TO SEARCH: See attachment 1.

FOR THE FOLLOWING PROPERTY/ PERSON: See attachment 1.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to as true and subscribed before me this 1 day of Oct 2010 at 5 PM. Wherefore, I find

probable cause for the issuance of this Search Warrant and do issue it.

HOBBS	YES [ ]
SEALING	NO [X]
REQUESTED:	
NIGHT	YES [ ]
SEARCH	NO [X]
REQUESTED:	

_____/s/_____

(Signature of Magistrate)

Judge of the Superior Court, North Judicial District.

ATTACHMENT # 1

YOU ARE THEREFORE COMMANDED TO SEARCH:

The residence and property at 43263 18th St west, in the City of Lancaster. The property to including all outbuildings, sheds, vehicles and containers on the property. The house is described as a single story house with brown stucco trim, and wood trim with peeling paint. The roof is gray in color and composition in style. There is a white metal screen door on the front of the location. The front door is on the east side of the residence. however, facing north. The shed in: the backyard is described as made with brown plywood and 2 x 4' wood construction. The front door of the location has a black screen on it. The front door faces east.

FOR THE FOLLOWING PROPERTY / PERSON:

All evidence related to the possession and ownership of any rifle, shotgun or BB/Pellet gun at the location. Any ammunition holsters or cleaning kits for the above mentioned. Any paperwork including receipts and registration which will show ownership of the firearm. Any and all expended shell casings and bullet fragments, any evidence related to the discharge of a firearm, blood and trace evidence, measurements and photographs documenting the shooting at the scene.

AFFIANT STATEMENT

Your Affiant, Detective Mark Donnel, is a peace officer for the Los Angeles County Sheriff's Department and has been so employed 10 years. Your Affiant is currently assigned to Lancaster Station's Directed Patrol Unit.

Your Affiant attended a Reserve Peace Officer's Academy and the Los Angeles County Sheriff's Academy and continuous in-service training. Your Affiant has an Associates of Arts degree in Administration of Justice. Your Affiant has been assigned as a Deputy to Custody Division, Patrol, OSS/ Gang Enforcement Team, and as a Station Detective.

Your Affiant has received approximately 200 additional hours of formal training from homicide Investigators, gang and narcotic Investigators, sexual assault Investigators, property crime and identity theft Investigators, station Detectives, ATF Special Agents, United States and District Attorneys, the California DOJ and various Peace Officer Associations. This training is continually ongoing.

During your Affiant's education, training and experience he has learned about and has been involved in investigations and arrests involving various crimes. This experience was gained through formal instruction, arrests, followup investigations, custody interviews of convicted inmates, and field interviews of both criminals and non criminals. The

crimes which this Affiant has experience in are as follows:

Narcotic related crimes- under the influence, possession, manufacturing, transportation and sales;

Criminal Street Gang activities- in their recruitment, subculture, and criminal activities;

Violent crimes- homicides, firearms and deadly weapon assaults, robberies, and physical assaults; and the preservation and collection of evidence.

Sexual based crimes- rape, indecent exposure, annoy/molest children; sexual offender registrations;

Property crimes- residential and commercial burglary; vehicle theft, petty theft and grand theft;

Financial crimes- private and public embezzlement; forgery of private and public documents, and identity theft.

STATEMENT OF PROBABLE CAUSE:

On 10-01-10 at approximately 1247 hrs Your Affiant went to 43263 18th St west, in the city of Lancaster. While there I was informed that two Los Angeles Co Sheriff's deputies had been involved in an on duty shooting just minutes prior to our arrival. During the course of the shooting two people were hit by gunfire. The deputies fired several rounds during this incident.

The deputies went to the location searching for a wanted "parolee at large" who had been known to be in possession of a firearm. The parolee is named "Ronnie O'Dell" (MH/12-03-79, male white 602 180). O'Dell was believed to frequent the address of 43263 18th St west, Lancaster, multiple times. O'Dell had been seen by Dep Zeko within the past hour within blocks of the residence. O'Dell has run from deputies numerous times in the past.

Deputies contacted a female named "Paula Hughes" (FW/12-03-79) inside the residence of 43263 18th St west. Hughes initially refused to cooperate with the deputies and would not speak to them. She later said she was the resident of the house.

Deputies went to a plywood shed in the backyard of the residence. Deputies made contact with a male adult, later identified as "Angel Michael Mendez" (MH/04-09-80). Mendez was inside a shed in the back yard. When the deputies contacted Mendez he pointed a sawed off rifle at them. Deputies fired at Mendez. Mendez was hit by gunfire along with a female who

was also inside the shed. The female adult was later identified at "Jennifer Garcia."

Angel Mendez and Jennifer Garcia were transported to Antelope Valley Hospital for treatment.

After the incident Det. Owen looked into the plywood shed from the outside. This is the same shed where the shooting took place. Det. Owen saw what appeared to be a sawed off rifle or shotgun laying inside in plane view. Also in the backyard was a cardboard box. The cardboard box was a package for a BB/ Pellet rifle. Det. Owen said the sawed off rifle or shotgun he saw appeared to possibly be the BB/ Pellet rifle from the box. There were also numerous fired bullet shell casings on the ground near the shed.

While Angel Mendez was being loaded into the ambulance he told your Affaint the following: "I'm sorry, I'm sorry, I'm really sorry. It was just a BB gun. I was just trying to move the BB gun. I'm sorry."

The resident of the house (Paula Hughes) said before the incident she saw deputies were knocking at her front door. She refused to talk to them initially. The resident of the house said she knows Angel Mendez and Jennifer Garcia. She knows they are local transients without a home. She allows, them to stay overnight in the shed in the backyard. She was unaware they were in the shed at the time of the shooting with the deputies. Hughes said she purchased a BB/ Pellet gun one month ago. She allowed Mendez to use the BB/ Pellet rifle.

Your Affaint believes that a search of this location, including the residence and back yard shed will result in locating the requested items for this crime scene investigation.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF TRIAL, DAY 1

LOS ANGELES, CALIFORNIA

FEBRUARY 26, 2013

ROSALYN ADAMS, CSR 11794
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* * *

[72]

Angel Mendez, plaintiff, was sworn and testified as follows:

THE CLERK: please state and spell your name for the record.

THE WITNESS: Angel Mendez, A-N-G-E-L M-E-N-D-E-Z.

DIRECT EXAMINATION

* * *

[85]

MR. DREXLER: Let me re-ask it—

THE COURT: Let me say Mr. Drexler I was about to say at the lunch break, if something's foundational and it's really not disputed I don't mind if you lead the witness because it moves things along but if it's important or if it's disputed then not. I certainly have no intention of letting you lead the witness when we get to the shooting. So just keep that in mind.

The objection is sustained.

MR. DREXLER: Thank you, Your Honor can you tell us what those are on the ground.

A. This one here is and extension cord that runs to my place (indicating) and this one here is a water hose running to a spigot here.

Q. What was the electrical cord for?

A. It was for electricity in my place.

Q. Okay. And what did you have in the shack that required electricity?

A. TV, air conditioner, a light and heater.

Q. Okay. Let's go to the next photograph which is 223-86. Tell us which view we're looking at now?

A. We're looking east from the backyard.

Q. Okay. Can you show me where Charlie Green was talking from and orient us on that in the photo?

A. Yes.

[86]

THE COURT: Witness complies).

Q. And you mention you had and air conditioner can you show us where the air conditioner is?

A. Yes. (witness complies).

Q. Okay. And how far is that tree that we see from the front of your I don't know the door?

A. I'm sorry say that again.

Q. This tree here?

A. How far is that?

Q. Yes?

A. I'd say three, four, feet.

Q. Okay?

THE COURT: Mr. Mendez, the white rectangle is the storage locker that you testified about earlier?

THE WITNESS: Yes, your honor.

THE COURT: Go ahead.

MR. DREXLER: That was right there, Mr. Mendez.

A. Yes.

Q. And the cars that we talked about earlier this is one of those—is this one of those cars here?

A. Yes.

Q. Okay. Next, I'd like to go to 223-205.

And again the—can you show us the clothes locker just circle that?

A. Yes (witness complies).

[87]

Q. And the front door to the shack is where?

A. (witness indicates).

Q. And is that electrical cord visible here?

A. Yes.

Q. Can you point that out?

A. (witness complies).

Q. And to your knowledge this is the way it was—is represented that these photographs were taken after the shooting but to your knowledge is this the way it looked at the time of the shooting?

A. Yes.

Q. And what are in these boxes or whatever that is here in front?

A. Clothes.

Q. And next to it is that just a regular chair?

A. Yes.

Q. And do you know if these items that we see right in front of the entryway—were those there also at the time of the shooting?

A. I don't recall. I don't recall.

Q. Okay. Let's go to the next one, more of a close up, that would be 223-271.

And Mr. Mendez, is that the front door open?

A. Yes.

Q. That was the same—there's only one entry—strike [88] that.

How many entrances is there had to the shack?

A. Only one.

Q. Any windows?

A. No.

Q. And what is it that is the blue thing hanging next to the door, this?

A. That is a blanket I hang in front of the door to keep the air conditioning—air in and the heat out.

THE COURT: Mr. Mendez, immediately to the right of the blanket that you just identified, it looks in the photograph here as if I'm looking through a

window further to—that—further to the west. Is that a mirror or is that a small window?

THE WITNESS: It's a Coca-Cola poster.

THE COURT: It's a poster, not on the right.

MR. DREXLER: We're talking about this.

THE COURT: Yes, that's correct.

THE WITNESS: It's a poster.

THE COURT: It's a poster, thank you.

BY MR. DREXLER:

Q. Other than the front door, there are no other openings, correct?

A. Correct.

Q. And no let's go to the next one for a further close up,

* * *

[172]

THE COURT: All right. Just wanted to clear that up. Thank you.

Mr. Hurrell, you may start your cross-examination.

[173]

MR. HURRELL: Thank you, Your Honor.

* * *

[176]

Q. Did she get up to turn off the air conditioner?

A. Yes.

Q. So you were semi-awake when the door flew open?

A. No.

Q. You had fallen back to sleep?

A. Yes.

Q. So you fell asleep within that 10-minute period of time?

A. Yes.

Q. Now, you're lying on your back when the door flew open, correct?

A. Correct.

Q. And the gun is on your left side, correct?

A. Correct.

Q. Now if—your honor, may I sit in the chair and ask if I could take Mr. Mendez through the movements?

THE COURT: You may.

MR. HURRELL: Thank you. I'll sit here so you can see—

THE REPORTER: I can't hear, your honor.

THE COURT: Mr. Hurrell, the court reporter can't hear you. So, if you're going to do that, bend the microphone towards you and speak up.

BY MR. HURRELL:

Q. Mr. Mendez, if I am you and I'm lying on my back in bed, just to the left where my left arm is where your BB gun is, [177] correct?

A. Correct.

Q. And you hear the door come open on the shed, correct?

A. Correct.

Q. And do you then start to get up?

A. Yes.

Q. And I believe you testified that you put your left hand on the butt of the gun, correct?

A. Correct.

Q. Your right arm is where? Is it next to you?

A. Yes.

Q. On your right side?

A. Yes.

Q And is it situated as I have my hand and arm now so that the back side of your arm is facing up?

A. Correct.

Q. And that's where, actually, you got shot, correct?

A. Correct.

Q. So you have your left hand and arm on the butt of the gun, correct?

A. I'm sorry. Say that again.

Q. You have your left hand on the butt of the gun, correct?

A. Correct.

Q. And you start to get up in reaction to the door coming open?

[178]

A. Correct.

Q. And do you start to lift the gun—

A. No.

Q. —to get up? It stays on the bed?

A. Oh, no. I do lift it up.

Q. And then you are going to turn yourself so that your legs and feet come around to get onto the floor, correct?

A. Correct.

Q. And when you make that turning motion, does your gun turn with you?

A. Correct.

Q. So now the gun is pointed to the door of the shed that's to your left, correct?

A. No, I'm sorry. Can you go back one question?

Q. As you turn your body to get your legs and feet off the bed, you're rotating your torso in order to do that, correct?

A. Correct.

Q. And you just said that the gun follows you so that the barrel of the gun is now pointed towards the door; isn't that true?

A. No.

Q. Why isn't that true?

A. Because the barrel of the gun was facing the south wall the whole time.

Q. Well, when you turn your body to get your legs and feet [179] off the bed, you say your left arm is not following you?

A. Yes, it's following me, but the barrel was faced towards the south wall the whole time.

Q. You specifically have that memory?

A. Yes.

Q. Why was it that you kept the barrel of the gun towards the south wall, instead of letting it follow your body as you rotated out of the bed?

A. It was facing—the butt end of the gun was facing the north end, and the barrel of the gun was facing the south end even when I was laying on the ground—laying on the bed.

Q. Then as you come and lift—you come out of bed and you lift the gun off the bed, correct?

A. Correct.

Q. Are you intentionally turning the barrel of the gun towards the south wall as you rotate your body out of the bed?

A. No. It was already facing the south wall.

Q. But you actually have to make a conscious movement with your left arm to turn the barrel of the gun to the south wall as you rotate your body out of the bed; isn't that true?

A. Not necessarily, no.

Q. Well, if you didn't make that conscious movement, the barrel of the gun would follow your movement out of the bed and be pointed at the door; isn't that true?

* * *

[182]

A. Yes.

Q. Now, your right arm was fractured by that bullet; isn't that true?

A. Correct.

Q. And bullet fragments remain in your arm from that bullet; isn't that true?

A. Correct.

Q. After the shots stopped coming, where was your body?

A. My body was sitting down still on the bed.

Q. So you did not fall back in the bed?

A. No, I—I would roll over to the left.

Q. So you rolled back with your head situated at the top of the bed?

A. Yes, to protect my fiancee at the time.

Q. And the gun was where?

A. The gun was on the floor already.

Q. Do you have a memory as to how much time lapsed from when you saw that door open till when the first shot occurred? Just a couple seconds?

A. Yes.

Q. Now, would you describe your movement in getting out of the bed as a fast one?

A. Yes, because I was startled.

Q. Now, as I understand, Ms. Hughes who lived in the primary residence there would sometimes play a trick on you

UNITED STATES OF AMERICA
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CENTRAL DISTRICT OF CALIFORNIA
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HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF TRIAL, DAY 2

LOS ANGELES, CALIFORNIA
FEBRUARY 27, 2013

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* * *

[5]

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Roger Alma Clark; R-O-G-E-R, A-L-M-A, C-L-A-R-K.

THE CLERK: Thank you.

THE COURT: All right. You may proceed.

MR. DREXLER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. DREXLER:

Q. Good morning, Lieutenant Clark.

A. Good morning.

Q. You have been retained as an expert in this matter; is that correct?

A. Yes.

* * *

[33] have a file and a chronology of activities devoted towards the apprehension or investigation that is ongoing. And anything that's part of that

investigation would be logged in and—as information, and if there's evidence, it certainly would have been tagged and marked and given the file number. So you would have expected to see if there was evidence seized as Rose Larson's house, that Rissling would have had that documented in her file, as well as any evidence would have been in the evidence locker.

Q. Now, the other portions of what was mentioned in the briefing by Rissling, I'd like to direct your attention to, and perhaps it would be useful to play two very short clips of Deputy Conley and Deputy Pederson's testimony about hearing the information about people in the shed.

MR. DREXLER: If I may, Your Honor?

THE COURT: You may.

MR. DREXLER: First, Tony, Conley—that's the 232-40.

(Audio played, not reported.)

MR. DREXLER: Sorry, Your Honor, got the wrong clip.

(Audio played, not reported.)

MR. DREXLER: And second clip of Deputy Pederson on the same issue.

(Audio played, not reported.)

[34]

THE COURT: This was exhibit 232 from pages 63, 64?

MR. DREXLER: Yes, Your Honor.

THE COURT: Okay. Go ahead.

BY MR. DREXLER:

Q. Based on the information conveyed by Deputy Rissling to all of the officers in the briefing, including Deputies Co..ley and Pederson, what is the significance to you of—in terms of briefing these people for these raids that briefing the officers for the raid, that there were people known to be living in a shed or a shack in the back of Paula Hughes' home?

A. Well, it's for officer safety as well as for the safety of the people that are going to be exposed to the police activity. So, in this case, it's clear, then, that there are people that could be in that shed or that shack, and the officers are on the property with that knowledge.

Q. Do you believe that everything you know about the briefing that there were any deficiencies in that briefing because it didn't have any reason that it did not account for these people or what tasks should be done in what way given the fact that there were people living back there?

A. Well, the principals of command and control for the supervisor would be then to give specific instructions and assignments for deployment. In that regard, you have to make sure that there's enough personnel that everyone understands [35] their position, what radio frequencies are going to be on, it goes through a litany of requirements. And this is taught to every sergeant while they're at Sergeant Supervisory School by post as well as the department. So the officers that are going to be in the back and if there's going to be some sort of search in the building in the main residence, then are on notice that there are people in the rear in sheds and they would deploy accordingly with the sufficient number of personnel and tactically as necessary.

Q. You've read Deputy Conley's deposition and his interview where he says that he did not know—he was given no specific instructions of what to do in terms of clearing a shed in the back that may be inhabited.

Do you recall that?

A. Yes, I saw that.

Q. Does that reflect—do you have any opinions on whether that reflects that the briefing was deficient in not being specific about what to do with that inhabited shack?

A. Right.

That is a specific deficiency that was critical to deploying personnel. There has to be a clarity of assignment and positioning and understanding among all personnel exactly who's going to do what and in what order. So when you start deploying personnel for, say, a search of a house or to saturate an area looking for a—piece of property, to check [36] it out, there has to be that kind of understanding and assignment. And anything less than that is far below the professional standard and runs the risk of creating a death or an injury. So this is—it's fundamental to the—what we call the multi-unit deployment to have this kind a briefing with this kind of particular assignment.

Q. At the time that—also, excuse me—strike that.

In Deputy Conley's deposition and interviews, was it clear whether his understanding was that the search of the rear of the house was to go on before, during or after the containment or search of the Paula Hughes' house?

A. My recollection of his deposition he didn't know in what order.

Q. And—

A. I know what order it occurred, but exactly that he did not know because he did not have that specific information given to him or order given to him.

Q. In terms of practice at a briefing, how important is it that everybody listens to what's being

said? Do you have any opinions on how that went down in this case?

MR. HURRELL: Objection, Your Honor. This is improper.

THE COURT: Well, I haven't heard any evidence, obviously, about the briefing. I'll allow the question. Overruled.

[37]

THE WITNESS: It's fundamental to the safety, because if you don't pay attention and it's not done correctly people can get hurt or killed. It's that simple and it's that important. So I said in my deposition that if you attend the briefing, you better listen to it, and that's expected as part of the professional standard.

BY MR. DREXLER:

Q. So based on the information available and prior to asking this question—

MR. DREXLER: if I may just play a quick clip of—Minster No. 1, the—

(Audio played, not reported.)

BY MR. DREXLER:

Q. So that is exhibit 56 at page 164 of Sergeant Minster's interview with homicide bureau detectives.

The fact that—oh, let's go back to some foundation.

Is Sergeant Minster the one who directed the briefing?

A. Yes.

Q. And he's the one who authorized the raids on these two homes?

A. Yes.

Q. And when he says in his statement that the person on a bicycle just left one of the two dope houses, does that have

* * *

[155]

THE CLERK: Please state and spell your name for [156] the record.

THE WITNESS: Jennifer Lynn Mendez; J-E-N-N-I-F-E-R L-Y-N-N, M-E-N-D-E-Z.

THE CLERK: Thank you.

THE COURT: You may proceed.

MR. DREXLER: Thank you, Your Honor.

DIRECT EXAMINATION

* * *

[160]

Q. Who parked it there?

A. I did.

Q. Were you riding it?

A. The night before.

Q. And why did you park it there?

A. Because I didn't want to carry it all the way to the backyard because I had bags in my hand.

Q. Who's bike is that?

A. My husband's, Angel Michael Mendez.

Q. How long did he have that bike?

A. For about a year.

Q. Did Paula Hughes know that that was Angel's bike?

A. Yes.

Q. At the—as of October 1st, 2010, were you living in the—a shack in the backyard of Paula's home?

A. Yes, I was.

Q. And I'll just show you one photo. We've had many photographs that have already been identified. This is 223-271.

Is that the dwelling that you and Angel were living in as of the time the shooting?

A. Yes, it was.

Q. And just a few things just to describe—the door is open that's a wooden door?

A. Yes, it is.

[161]

Q. And the blanket, that blue blanket, how is that normally hung?

A. It's nailed up on top of the door frame.

Q. And did it take up the whole front of the inside of the door?

A. Yes.

Q. And on the date right before the shooting, was that blanket up and tacked to the top?

A. Yes, it was.

Q. And was the front door closed?

A. Yes, it was.

Q. Now, do you remember before the shooting what you were doing inside—inside your dwelling?

A. I was sleeping.

Q. And, at that time, you were pregnant?

A. Yes, I was.

Q. How far along?

A. Seven months.

Q. How far along pregnant are you now?

A. Eight months.

Q. And you have—from the pregnancy of—in 2010, you have a son?

A. Yes, I do.

Q. And that's—his name is A.J.?

A. Yes, it is.

[162]

Q. And he's a healthy little boy?

A. Yes, he is.

Q. Okay. And he's staying nearby with friends now?

A. Yeah.

Q. Okay. And the—how long had you lived in that shack as of October 1st, 2010?

A. From January 2010, so ten months.

Q. And who built that shack?

A. Angel.

Q. Did you see him build it?

A. Yes.

Q. And you were living there with the permission of the owner, Paula Hughes?

A. Yes.

Q. And if you can just describe—besides we talked about the door and the blanket, was there also a clothing closet and the—on the side of the—on the side of the shack?

A. Inside to your right.

Q. Exhibit 223-74.

Is that right here where your clothes were kept?

A. Some of them.

Q. Okay. And you also—there's also an air conditioner, is that here (indicating)?

A. Yes.

Q. And a tarp on the top?

[163]

A. Yes.

Q. And the air conditioner and the electricity—oh, you had a T.V. inside?

A. Yes.

Q. And there was a power cord leading from the shack?

A. Yes.

Q. And that's where it was?

A. Yes.

Q. Okay. And there's a bin of clothes.

Was that there as it is now on the—to the left of the front door?

A. Yes, it was.

Q. Okay. Now, at the time—one other thing. There—your yard in the front of your dwelling, as you looked towards Paula Hughes' house, was there a fence that went around Paula Hughes' backyard that separated your front yard from her backyard?

A. Yes, there was.

Q. Okay. And there were also sheds that were on the south side of the property that were storage sheds?

A. Yes.

Q. How many were there?

A. Three.

Q. You didn't keep any items in there, did you?

A. No.

[164]

Q. Okay. Was there just a difference between the storage sheds and how they looked and your dwelling?

A. They were made out of metal.

Q. Okay. And were they the same size or smaller?

A. They were smaller.

Q. Okay. And when you—right before you went—do you remember when you went to take a nap on the morning of October 1st, 2010?

A. I was sleeping through the night. I'm—I got up once and—to turn off the air conditioner, but then I went back to sleep. There wasn't like a nap in the afternoon. I was still sleeping from the night before.

Q. Okay. So what was the—the air conditioner, then, was off when the shooting occurred?

A. Yes.

Q. And there was some information about the T.V. had been on, do you know if the T.V. was on?

A. No.

Q. It was not on?

A. It was not on.

Q. Okay. And the—you saw the BB gun here in court, was that the BB gun that Angel had?

A. Laying on the bed with him?

Q. Yes.

A. Yes.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF TRIAL, DAY 3

LOS ANGELES, CALIFORNIA

FEBRUARY 28, 2013

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* * *

[84]

RECROSS EXAMINATION

BY MR. DREXLER:

Q. Good morning, Sergeant Harris.

* * *

[89] LANCAP, there was some surveillance that was being done at 18th Street West; is that correct?

A. I don't remember.

Q. Was Deputy Rissling part of LANCAP when you were there?

A. Yes, sir.

Q. Are you aware that she conducted surveillance at—on 18th Street West and became aware of the Mendez specifically by name, living in the back of Paula Hughes' house in a shack?

A. I—no, I don't know of that whole statement. I know that it's very common for us when we're looking for suspects or looking at locations for narcotics after you surveil, that is very common, but I don't know that she knew Mr. Mendez by name.

Q. Well, you said you had attended the briefing at the back of the Albertson's store. Didn't Rissling announce to everybody that Angel Mendez and his pregnant girlfriend was—were on—living on the property in a shack in the backyard?

A. No, not that. No, not that effect. I don't think any names were mentioned and there was no pregnancy mentioned.

Q. Okay. Regardless if you heard or remember the names or the pregnancy, let me reask the question.

Isn't it true that based on Rissling—Deputy Rissling's surveillance on 18th Street West, she became aware [90] of people living in the back of Paula Hughes' house in a shack in the backyard? She announced that to everybody.

A. I don't think she announced just that, but I believe that the briefing was there could be people staying in the backyard in the shed. I think that's what I remember, that statement.

Q. So you do remember Rissling saying that at the briefing?

A. Not exactly how you phrased it, but I do remember a statement being said there could be possibly people in the backyard.

Q. Now, just going back to the surveillance for a moment. Did you ever see any report generated from Deputy Rissling or any other officer that—during that

surveillance that connected Ronnie O'Dell with Paula Hughes' house?

A. No. No, sir.

Q. Okay. Now, moving to the search of Rose Larson's house. Was that June 26, 2010? Would that be about right?

A. Yes, sir.

Q. And at the time was—were you in charge of the—that search, that compliance check search at Rose Larson's house?

A. Yes, sir, I was.

Q. And Deputy Rissling was also there?

A. Yes, sir.

Q. Did you observe Deputy Rissling force Ms. Larson to the ground either by tackling her or a thumb hold of some sort?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MICHAEL W. FITZGERALD,
JUDGE PRESIDING

ANGEL MENDEZ, et al.,

Plaintiffs,

vs. No. CV 11-4771-MWF

LEROY D. BACA, et al.,

Defendants. Trial Day 3
PM Session

REPORTER'S TRANSCRIPT OF COURT TRIAL
PROCEEDINGS
Los Angeles, California
Thursday, February 28, 2013
1:25 P.M.

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* * *

[22]

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Veronica Ramirez, R-a-m-i-r-e-z.

DIRECT EXAMINATION

BY MS. BIANCO:

Q. Good afternoon, Deputy Ramirez.

* * *

[32]

Q. And what happened?

A. The male was standing right in front of a shed-type structure. At that time he was bleeding. There was no more shots fired at that time. Pederson and Conley were trying to get the male to step out away from the shed area.

Q. And you administered first aid to the male.

A. As soon as it was cleared, yes.

Q. Was he saying anything?

A. He did mutter a couple of things; that he was sorry; that it was not real. He was moaning with pain.

Q. Did you see the shed?

A. Afterwards, yes.

Q. To you, did it look like a place where people would live?

A. No. Definitely no.

MS. BIANCO: Thank you.

I don't have anything else.

THE COURT: Cross-examination.

MR. DREXLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DREXLER:

Q. Good afternoon, Deputy Ramirez. The way that the TOP's Bureau works in terms of parolees is at any given time you have a list of about 30 to 35 names; correct?

A. The number varies, sir, but that's correct; we have a list.

* * *

[38]

BY MR. DREXLER:

Q. At the briefing, did you hear Deputy Rissling tell everybody that there were people—based on her surveillance, there were people that she identified by name, Angel Mendez and his pregnant girlfriend, who lived in the rear of the property [39] in a shack?

A. No.

Q. Is it that you don't recall as you sit here today, or you definitely remember not hearing that?

A. I definitely would remember hearing that, so I did not hear it.

Q. And were you huddled in the group? Were you on the perimeter? Where were you when the information was conveyed?

A. Do you mean by "information" the briefing?

Q. Yes.

A. I was part of the briefing.

Q. Okay. And if I'm not mistaken, you said that it was Sergeant Minster and Sergeant Harris who were doing the talking. You didn't mention Deputy Rissling. Am I correct in that?

A. Correct.

Q. Okay. So whatever Deputy Rissling may have told the others, you apparently did not hear that; is that a fair assessment?

THE COURT: Counsel, really, it assumes that Deputy Rissling said something. I mean, that might be obvious to everyone else in the courtroom, since you've had depositions and read reports. It's not obvious to me. So don't assume that in your question.

MR. DREXLER: Very well.

* * *

[47]

Q. And at the Albertsons, how many deputies were there at the briefing, if you remember, roughly?

A. There was multiple; probably more than 15.

Q. And how big of an area was the back of the Albertsons where the briefing occurred?

A. It's a parking lot area.

MS. BIANCO: Nothing further. Thank you.

THE COURT: Any recross?

MR. DREXLER: No, Your Honor.

THE COURT: Deputy, you're excused.

Your next witness.

MR. HURRELL: Deputy Christopher Conley.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Christopher Conley, C-o-n-l-e-y.

DIRECT EXAMINATION

BY MR. HURRELL:

Q. Deputy Conley, you're employed with the LA County Sheriff's Department.

A. Yes.

[48]

Q. When did you start with the department?

A. 2006.

Q. Can you describe your assignments with the department from then up until now?

A. I was initially assigned to Pitchess Detention Center, North Facility, where I worked custody division. I was then transferred to Palmdale Station patrol, where I worked approximately three years. And then I went to COPS Bureau, that's C-O-P-S Bureau, where I worked Lancaster Hit Team for approximately a year. I moved to the South Los Angeles CIT Team, that's C-I-T, for a little over a year. And then I transferred to the Compton HIT team; that's H-I-T. And now I'm working COPS Bureau Headquarters.

Q. Can you tell us, what is COPS?

A. COPS is Community Oriented Policing Services, and it's a bureau that was formed to handle problems that are specific to a station or an area; so if they have an area with a particular gang that's a problem, we target them based on specific needs.

Q. You said as part of the COPS Bureau, you were with the HIT Team.

A. Yes, sir.

Q. And that's H-I-T?

A. That's H-I-T; High Impact Team.

Q. What is that team? What do they do?

A. Specifically, they do crime suppression, but they also [49] cater to community relations. So if there's an issue with, like, lets say, run-down houses and whatnot, sometimes we'll work in conjunction with code enforcement and whatnot to get the houses cleaned up to—it's quality-of-life issues, and stuff like that.

Q. Now, on October 1st, 2010, was your assignment with the HIT division of the COPS Team?

A. Yes, sir; Lancaster HIT Team.

Q. Okay. And did you report that day to the Albertsons Supermarket at 20th and "K" Street in Lancaster?

A. I did.

Q. And how was it that you were asked to report to that location?

A. That I do not recall, but I remember that they requested us to take a containment position on the side of Albertsons.

Q. Were you asked to basically assist in what was going on that day?

A. Yes, sir.

Q. So tell us what happened when you got to Albertsons.

A. We were directed – and I forget who told us – to take a position on the south side of the Albertsons in case the man, who I later learned was Ronnie O'Dell, escaped through an emergency exit on the side of the store.

Q. You were working that day with a partner.

A. Yes, sir; Deputy Pederson.

[50]

Q. Pardon me?

A. Deputy Pederson.

Q. How long had you been partners with Deputy Pederson up until that point in time?

A. I would say maybe around six months to a year.

Q. Now, when you got to the Albertsons, did you know what you were looking for—doing there?

A. Yes, sir.

Q. Somebody told you you were looking for a parolee-at-large.

A. Yes, sir.

Q. Did you know anything about Mr. O'Dell before that day?

A. No prior history specifically on his criminal past.

Q. Were you given any information that day that Mr. O'Dell was considered to be armed and dangerous?

A. That I do not recall.

Q. So tell us what happened at Albertsons. After you got there, what did you do?

A. After taking a containment position on the south side, they determined him not to be present at the Albertsons and we met in the back for a debrief.

Q. What's the debrief consist of? What did it consist of?

A. Debriefs are for—and this one in particular included—where you set up an operation and you talk about it after, see if we could have done anything safer, better; and it was at that point we received new information.

[51]

Q. Okay. What information did you receive that was new?

A. I believe it was Deputy Rissling received information that Ronnie O'Dell had been spotted at a friend's house, or something of that nature.

Q. What do you specifically recall being told in this briefing about Mr. O'Dell and where this house was located?

A. They devised a plan on—I guess there were two locations—they devised a plan. They divided us up into two teams for the two individual locations. They passed around a picture of him so we knew exactly what he looked like and they gave us details, and ours was to make our way to the rear of the yard or somehow get an observational perspective on the backyard in case he fled.

Q. Were you assigned to basically check the backyard for—what specifically were you going to do in the backyard?

A. They mentioned that there were sheds and to clear the sheds just to make sure we were safe and then take up a containment position.

Q. The containment was for what purpose?

A. To apprehend him if he fled through the backyard.

THE COURT: Who is "they," Deputy? Who gave you the instructions in regard to clearing the sheds and the containment?

THE WITNESS: I cannot recall which one of the [52] sergeants. I believe we had three sergeants at the briefing, and I don't recall which one it was, Sir.

THE COURT: Go ahead.

BY MR. HURRELL:

Q. Did you hear any information during this briefing about people being in the backyard of the location you were going to go to?

A. No.

Q. What happened after the briefing took place? Did you go to the location?

A. Yes, we did.

Q. And what did you do when you initially got there?

A. We made our way to the backyard, as we were instructed.

Q. If I could show you a series of photographs just to describe how you made your way into the backyard. We'll start with Exhibit 223, Page 28.

(Document is displayed at this time.)

Q. Is the home on the right side the home that you responded to?

A. Yes, sir.

Q. Okay.

If you could look at Page 29 of the same exhibit, is that looking at the home from a little different perspective?

A. Yes, sir; same house.

Q. Now, when you arrived there, you were with

* * *

[58]

Q. If we could look at Page 69, I'm displaying now, of Exhibit 223, does that photograph depict another shed in the backyard?

A. Yes, sir.

Q. And was it your intent, along with Deputy Pederson, to check out this shed and clear it?

A. Yes.

Q. And I know the photographs seem—excuse me, I'm flipping through here—the photographs show us, but can you just describe for the record, is the construction of the first three sheds different than this fourth shed?

A. Yes. The first three were that sheet metal kind of shed, and this one was of wood composite, kind of just like it was pieced together with different things.

Q. Was there anything about the appearance of this fourth shed, as you and Deputy Pederson approached it, that led you to believe that anyone would be actually residing in or living inside that shed?

A. No, sir.

Q. If we can look at Page 205 of Exhibit 223.

(Document is displayed at this time.)

Q. Does this depict the entrance to that fourth shed?

A. Yes, it does.

Q. Can you tell us, when you approached this entrance, was the door closed?

[59]

A. The door was closed; the screen door, I believe, was open.

Q. And describe how you positioned yourself at this door before—I assume you opened the door at some point in time; correct?

A. Yes, sir.

THE COURT: Before your next question, Mr. Hurrell, let me ask Deputy Conley. In 223-205, there's a white locker-like, I guess—well, "structure" isn't the

right word, but there's a kind of a white locker-like thing there on the right side of the photograph. We've heard testimony about it. Was the door to that open or closed when you approached the fourth shed?

THE WITNESS: That I do not remember, sir.

THE COURT: Go ahead.

BY MR. HURRELL:

Q. So as you're positioned, can you tell us your position relative to the front door just before you opened it?

A. I was off to the right side of the door.

Q. Where was Deputy Pederson, to your knowledge?

A. To my knowledge, she was behind me.

THE COURT: Was there a wrought iron or some sort of metal screen door?

THE WITNESS: It appears to be in the picture, but I didn't recall one after the shooting. Maybe I saw it and I was just ...

[60]

THE COURT: I take it you don't recall opening one, then.

THE WITNESS: Oh. No, sir. I didn't open it.

THE COURT: All right. Go ahead.

BY MR. HURRELL:

Q. So did you open the front door of the structure?

A. The wooden swinging door? Yes.

Q. And when you opened the front door, did you have your gun drawn?

A. I did.

Q. For the same purpose that you had it drawn for the first three sheds?

A. Yes, sir.

Q. After you opened the front door of the door of the structure, that wooden door, what happened next?

A. Almost immediately after opening it, I saw the barrel of what I recognized as a rifle being pointed at me.

Q. Did you see anyone attached to the barrel or a person attached to it?

A. From what I believed, yes, it was a silhouette of a man holding a rifle.

Q. And how was the man positioned?

A. I couldn't tell due to it was dark. And I knew he was a little bit lower than I was; whether he was sitting, crouching, [61] or kneeling, I couldn't tell you.

Q. You say it was dark. This incident occurred midday; correct?

A. Yes, sir. However, it was overcast so it made it darker outside. And I don't believe the shed had any lighting in it.

Q. Were there any windows visible in the shed to you?

A. No windows visible, sir.

Q. So you see the barrel of a rifle. Did it appear to be pointed at you?

A. Yes, sir.

Q. What did you do then?

A. I thought to myself, This is where I'm going to die, because I thought whoever was holding the rifle got the jump on me. But almost instantaneously I yelled "Gun" and I fired my duty weapon.

Q. Why did you yell "Gun?"

A. So my partner would know that there was a threat.

Q. You mentioned you felt you were going to die at this point in time.

A. Yes, sir.

Q. Before shooting your—and you shot your revolver.

A. Yes, sir.

Q. Before –

A. I'm sorry. It was a semi-automatic, my duty weapon.

Q. Before doing so –

[62]

THE COURT: You anticipated my next question. Go ahead.

BY MR. HURRELL:

Q. Before shooting your weapon, did you shout any commands to the person inside the shed?

A. No, sir, I didn't.

Q. Was there time to do so?

A. I didn't feel there was.

Q. Did you know whether or not there was anybody else in the shed at that point in time?

A. I didn't see anyone.

Q. Describe what happened as you're shooting your gun. What are you doing?

A. As I was shooting, I was retreating; I was running backwards, I guess. And I stopped firing once I felt there was at least a safe distance, at least a little more distance between me and the threat.

Q. What happened then?

A. I heard Mr. Mendez yelling.

Q. What did you hear him say?

A. I don't recall everything he was saying. I remember him saying that his girlfriend was in there, and I was saying—I was yelling to him, I believe, Let me see your hands. I told him to exit the shed. And I forget what he said, something to the effect that his leg was hurt, I think, and I told him to [63] crawl out to me, which he did.

Q. Now, today we know that Mr. Mendez was holding a bb-gun; correct?

A. Yes, sir.

Q. From what you observed when you opened the door of the shed, did the weapon or the gun he was holding appear to you to be a real rifle?

A. Yes, sir, it did.

Q. So what happened after you ordered Mr. Mendez to come out of the shed?

A. He said his girlfriend was in the shed, and I requested that she come out as well, and she did.

Q. Did Mr. Mendez, did he eventually come out of the shed?

A. Yes, sir. He came out first and then Ms. Garcia came out.

Q. At that point in time, was emergency personnel summoned for Mr. Mendez and his girlfriend?

A. Yes, sir. One of the deputies that responded to the backyard requested them.

Q. You testified previously that you didn't hear any announcement at the briefing outside of Albertsons about people potentially being in the backyard; correct?

A. That is correct.

Q. Assuming that you had received that announcement, would that have changed any of your actions that day?

A. No, sir. Tactically I would have done the same thing.

[64]

Q. How many shots were fired from your weapon?

A. I know now, ten. At the time I didn't know.

Q. You testified you stopped shooting after you felt you were some distance away.

A. Yes, sir.

Q. Did you have shots left in your weapon afterwards?

A. Yes, sir; six.

Q. Is there a practice or a teaching method in the department that a deputy firing his firearm is to shoot two or three times and then stop and assess?

A. That was the way years ago they used to teach it; it's not that way anymore.

Q. What do they teach you in terms of that regard? If you're discharging a weapon, when do you stop shooting?

A. You stop shooting when there's no more potential threat; they teach 'shoot and move.'

Q. How were you emotionally within the weeks following this incident?

MR. DREXLER: Objection. Irrelevant.

THE COURT: Overruled.

THE WITNESS: After the incident?

MR. HURRELL: Yes. In the weeks following the incident.

THE WITNESS: Psychologically, I had some issues. I stayed up several nights in a row. [65] Do you want me to go on? Because there was a lot.

BY MR. HURRELL:

Q. Can you tell us what was going on with you emotionally?

A. In all honesty, it would play over and over in my head. I would drink. I would drink until I would go to sleep just to get some sleep and make it stop.

Q. During the incident did you feel that your life was in danger?

A. Yes.

Q. Going to Page 230 of Exhibit 223, is that a photograph of the gun that was pointed at you that day?

(Document is displayed at this time.)

A. I believe so, yes.

MR. HURRELL: That's all I have. Thank you.

THE COURT: Deputy, after Mr. and Mrs. Mendez left the shack, did you enter the shack personally?

THE WITNESS: No, sir.

THE COURT: All right. Let's take a break here, our afternoon break, and be ready to start again at 10 after 3:00.

(Whereupon a brief recess was held.)

THE COURT: Counsel, you may proceed.

MR. DREXLER: Thank you, Your Honor.

[66]

CROSS-EXAMINATION

BY MR. DREXLER:

Q. Good afternoon, Deputy Conley.

A. Good afternoon, sir.

* * *

[68]

Q. So as you sit here today, you don't recall her specifically being the one talking about Ronnie O'Dell being in the vicinity of either location.

A. That is correct.

Q. Okay.

Do you recall having the interview with the homicide investigator, Sergeant Marty Rodriguez?

A. Yes, sir.

Q. And in that homicide bureau investigation, did you tell Sergeant Ramirez that—excuse me, Sergeant Rodriguez, that you heard that there were people that may be staying in the shed in the back?

A. Yes, I did.

Q. And you've been sitting in the courtroom and you heard the audio of you saying that.

A. Yes, sir.

Q. And it's also contained in a couple of different places. And with the Court's permission, I'd just like to present that and show that to the witness.

THE COURT: You may.

MR. DREXLER: Thank you. Pull up 43, Page 80.

(Document is displayed at this time.)

BY MR. DREXLER:

Q. Do you see at the bottom where it says that "they made [69] their way to the rear and Pederson told investigators while they were in the rear yard, she and Conley were tasked to check and clear structures. She said she received information that persons were known to loiter or stay on the property." Do you see that?

A. Yes, sir, I do.

Q. And you were assigned containment, and your assignment was to contain the yard so people would not exit the house. Do you recall that?

A. Do I recall what she said? No.

Q. Well, let me go to Exhibit 62, Page 189.

(Document is displayed at this time.)

Q. Do you see here, this is Sergeant Rodriguez and Gray are asking the questions, and you say, "We're at the location looking for a parolee at large. Our detail was we received information that there were sheds in the backyard and that someone might be staying in one of the sheds. Our detail was to clear the sheds, make sure they were safe. We looked in the first three;

cleared those; they were fine. Those were fine. They were full of miscellaneous items, no people." So at the time you went to the location, you were aware that there were people who might be in one or more of the sheds in the back; is that correct?

A. No, sir.

MR. DREXLER: If I may play a short clip.

* * *

[90] while you obtained cover or concealment?

A. I think that goes back to me having the mindset that I did not want to give knock and notice because that would put me—if I was to give a knock and notice, then I would feel threatened. I would feel exposed, and I would feel as if I gave away my location.

Q. But you did feel you had concealment by the way you opened the door.

A. I would say concealment, yes.

Q. Okay. So more concealment is better; correct?

A. Yes.

Q. And if you had been back a ways, either behind the tree or some other object, you would have had more cover; correct?

A. I would say with possibly that bigger tree I would have cover, yes.

Q. Now, at the time that you opened the door, you don't recall if your tactical light on the Beretta was on or off; isn't that correct?

A. That is correct.

Q. And from your vantage point—strike that. At the time, I believe you testified that you were crouched.

A. Yes, sir.

Q. Now, did you have your gun cocked and ready or ready to shoot?

[91]

A. It was not cocked; however, it was in a position to fire.

Q. Why did you have it in a position to fire if you didn't feel threatened?

A. It's a safety precaution.

Q. And would it have been a safety precaution to call for backup at that point if you had any doubt if there was anyone in the shed?

MR. HURRELL: Objection. This has been asked and answered, Your Honor.

THE COURT: Overruled.

THE WITNESS: Your question was, would I have asked for backup?

BY MR. DREXLER:

Q. Yes.

A. I would say—I don't think I would have done anything differently. Like I said, my job is inherently dangerous. It's just—I know what I'm getting into when I perform my duties, and I can't ask for backup every time I do anything.

Q. But I'm just asking about this time.

A. And this time was no different.

Q. How much time passed between the time that you saw the barrel and the person, the silhouette of the person, and the time you fired your weapon?

A I would say—I know in I believe it was the IA interview that I said approximately 15 seconds, and I think that was a [92] little more than it actually was. I believe it was a few fractions of a second.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF TRIAL, DAY 4
LOS ANGELES, CALIFORNIA
MARCH 1, 2013

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* * *

[5]

THE CLERK: Please be seated.

Please state and spell your name for the record.

THE WITNESS: my name is Ronald Mc Carthy, M-C-C-A-R-T-H-Y.

THE CLERK: Thank you.

THE COURT: You may proceed, counsel.

MR. HURRELL: And before beginning, Your Honor, Mr. Mc Carthy is our police practices expert, and I'm going to for the sake of brevity, limit the inquiry to those events that involve Deputy Pederson and Conley and not to extraneous matters.

* * *

[18] trigger is far faster than trying to move to cover so literally the muzzle of the deputy's weapons is their cover and under the circumstances that exist here the firing of a round to end the threat that he and she reasonably perceived in my opinion, is the right thing to do.

Q. When you mentioned a verbal command if—we assume again, that the rifle—what was perceived to be a real rifle was pointed at Deputy Conley and we assume that Deputy Conley at that point in time

instead of shooting gave a verbal command. What would come first, assuming the holder of the rifle pulled the trigger, would the shot reach Deputy Conley before he made the verbal command?

A. Absolutely. It's impossible to prevent being shot if you're going to utilize a verbal command under these circumstances.

Q. From your background and training in law enforcement, how long does it take an individual to discharge a firearm, assuming they're on the trigger?

A. If the person holding the firearm has committed to shooting the firearm, pulling the trigger, it takes approximately a tenth of a second for them to do that; because they're in a role of anticipation as opposed to a deputy who has to react to what they see. And that's why the deputy has the weapon in their hand and the weapon is presented in a low ready position so that they can see if [19] there is going to be a threat, and that means that there is a matter of tenths of a second where they have to present the weapon to the target, put their finger on the trigger, and pull it. And that would take a little longer. Anywhere from two to four tenths of a second to accomplish that and some in those circumstances it takes much longer because they literally have a brain fade and can't react in a timely manner.

Q. I want you to assume for purposes of hypothetical question that a competing expert in police practices has testified that when Deputy Conley visualized the barrel of the rifle at him as he

was standing in front of the shed that he should have instead of shooting just moved out of the way. Do you have an opinion as to whether that conduct on behalf of Deputy Conley would have been appropriate?

A. Yes, I do.

Q. What's your opinion?

A. That moving out of the way is the wrong solution.

Q. Why?

A. Anecdotally speaking a police officer in Oakland tried to move out of the way of a suspect presenting a gun and recently was shot and killed. The reaction time and moving out of the way takes far longer than defending your life by firing a shot. And they're trained to fire a shot under these circumstances. So moving out of the way is not your [20] first and best solution, if you want it survive and you believe it's a gun.

Q. Based upon your—and I'm going to—then go to the final step here in this analysis. Is it your understanding that Deputy Conley's firearm was discharged ten times?

A. Yes, sir.

Q. Do you have an opinion as to whether discharging the firearm ten times was appropriate or inappropriate conduct on the part of Mr. Conley?

A. It's an appropriate response, sir.

Q. That sounds like a lot of shots to me. Why isn't that just too many?

A. Yes, sir. There's been study and research done that indicate that somebody who has never held a gun before can fire three rounds in one second with a handgun semi-automatic. The average police officer can fire five rounds in one second. When you're perceiving a threat to your life physiologically your heart rate soars from whatever the rate is just a split second before you see the gun and would soar to somewhere between 170 and 210 beats a minute. At the same time the response is to pull the trigger until the threat is over. So assuming that all of the shots from Deputy Conley and Deputy Pederson went off in about two to three seconds, in that [21] timeframe there has to be some signal message to the deputy that's firing the shots that the threat is over.

And if I might, if I could hold my fingers up. The rear side of their weapon and their front sight is now at—directed at the threat and they're firing their weapon. What usually causes the officer to recognize the threat is over is the target they're shooting at disappears, falls to the ground. In this case Mr. Mendez was already supine on the ground either in a semi prone or a sitting position on a futon. So there was no falling away from the site picture to cause the target to disappear. So the fact that he fired ten and not 15 and Deputy Pederson fired five and not ten or 15 means that they had made a decision to stop

shooting and do it in two to three seconds. And I think under the circumstances that's what you could expect from a well trained human being and you couldn't expect more.

Q. And were there rounds of ammunition still in both the weapons utilized by the deputies?

A. Yes.

Q. Is that significant to you at all, in your opinion?

A. I couldn't hear you, sir.

Q. Is that significant at all in your opinion?

A. That they still had the rounds in their weapon, yes sir.

THE COURT: I think that was the purpose of his prior—of the testimony he just gave.

[22]

MR. HURRELL: I just went at it a different way. You're right though, Your Honor. That's all I have. Thank you.

THE COURT: Cross-examination.

Mr. Drexler, you are out of time but, of course, I'm going to let you cross-examine the witnesses today, but just keep in mind that you have, in fact, used up the time that the court gave you.

MR. DREXLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DREXLER:

Q. Mr. Mc Carthy, just a couple questions about Ronnie O'Dell. You said you looked at his history.

Are you aware that the charge you referred to the assault with a deadly weapon was—had nothing to do with a firearm?

A. I have no idea what the deadly weapon was, sir.

Q. Okay. And you said you read the deposition of his probation officer, his parole officer.

Are you aware in that deposition that Brian Hines the parole officer said that Ronnie O'Dell to his knowledge never possessed a gun that was at page 41; do you remember reading that?

A. Yes, sir.

* * *

[28] Do you recall that?

A. Yes, based on their initial observations and based on the photographs that I looked at of that—or the photographs of that particular structure—if you call it a structure. I guess it is. And no, in my opinion that doesn't look like a residence, or a hotel room or an apartment.

Q. But you are aware that both Deputies Conley and Pederson reported to homicide investigators and internal affairs bureau investigators—that they were told before going there—that there was a shed in the back of the property where specifically people were living.

You do recall that?

A. I know that that was said in deposition by Deputy Rissling, yes.

Q. Okay. And also Deputies Conley and Pederson said afterwards that they had received that information that people—specifically by name Angel Mendez and his pregnant girlfriend at that time—were living in the back, right?

A. As I recall Pederson, specifically she said crashing or hanging out in the back was her understanding of what they were saying, not that somebody was—had established a formal residence in the backyard.

Q. So the deputies then did have reason to believe that it was inhabited—regardless of whether you believe there were

* * *

[32]

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Gregory Allen Minster. G-R-E-G-O-R-Y, A-L-L-E-N, M-I-N-S-T-E-R.

[33]

THE COURT: You may proceed, counsel.

MR. HURRELL: Thank you.

DIRECT EXAMINATION

* * *

[38]

BY MR. HURRELL:

Q. Was a plan developed out—in back of the Albertsons as to how to encounter this new information that Deputy Rissling had received?

A. Yes Deputy Harris—I'm sorry—Lieutenant Harris and Sergeant Fernandez took several deputies and were going to go to an address down the street, because that was a location he had been out before that they knew about, and there was a possibility that he might have already left that house. And I was going to go to the Hughes' house with my team members and two team members from the COPS team.

Q. At this briefing at Albertsons were Deputies Conley and Pederson given an assignment?

A. They were to cover the back of the house.

Q. Was there any information that was revealed by Deputy Rissling at the briefing about any individuals being in the backyard of Paula Hughes' house?

A. She said there could be a male and a female who are sometimes in the back shed at the house.

Q. Now, did you, in fact, go from the Albertsons to Ms. Hughes' home?

A. Yes.

Q. And what did you do when you initially got there?

A. We parked just to the south of her house, exited the vehicles and as I woke up—walked up towards the driveway I

* * *

[41] What was going to happen, but she did exit the door and I directed her down to Ramirez, who was at the bottom of the steps. I moved forward covered the inside of the house.

Q. And did you clear the house to see if he was in there?

A. Yes.

Q. And was he?

A. No.

Q. Was there a door or some kind of a closet inside of the house that was locked?

A. There was a door that was locked with a padlock on the outside and there was a dresser up near it.

Q. Were you able to gain entrance to that door?

A. No.

Q. What happened at that point in time after you've accomplished clearing the house?

A. I had Ramirez go out and talk to Mrs. Hughes to see about getting a key for that particular room. She came back and said that her mom—her deceased mother's property was inside and she didn't have a key. At that point Deputy Pederson said I'm going do go ahead and clear the backyard. I said okay. Deputy Cox and myself were looking at that door and seeing if we could see if maybe that door was shut and locked—in order to lock him inside that door—while Pederson and Conley went to check the backyard.

THE COURT: Let me ask before you go forward, Mr.

* * *

[44]

CROSS-EXAMINATION

BY MR. DREXLER:

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[48]

Q. You've never seen any report about that bike or anything connecting Ronnie O'Dell to the Rose Larson house, correct?

A. I have not seen anything physically, no.

Q. So whatever, whether it was a warrant or whether it was a compliance check, you've never seen anything from that visit by Sergeant Harris to Rose Larson's house which connected Ronnie O'Dell to the house?

A. I have physically not seen any of that paperwork.

Q. Okay. Now, Rissling—Deputy Rissling also—is it true — stated at the briefing that there were people, specifically by name Angel Mendez and his pregnant girlfriend—at that time—that were known to live or hang out in the back shed in the rear yard of Paula Hughes' house?

A. She said there was a male and a female that sometimes hang out in that back shed.

Q. So you do recall Deputy Rissling announcing that at the briefing—behind the Albertsons—

immediately before you authorized the operation to go to those two houses?

A. Before we went to the houses, yes.

Q. And Deputy Conley and Pederson were present during that briefing, correct?

A. Yes.

Q. Okay. And you heard that?

A. Yes.

Q. Okay. Now, at the time that Deputy Rissling made the

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[64]

THE CLERK: Please state and spell your name for [65] the record.

THE WITNESS: Claudia Rissling, C-L-A-U-D-I-A, R-I-S-S-L-I-N-G.

THE COURT: You may proceed.

MR. HURRELL: Thank you.

DIRECT EXAMINATION

* * *

[67] description of Ronnie O'Dell on a bike was at Paula Hughes' residence.

Q. Now, Paula Hughes, did you have prior knowledge of her and where she was—her residence was located?

A. Yes, sir.

Q. How did you gain that knowledge?

A. I received that knowledge initially when I started on land cap, and after that I had two separate informants that advised me that Paula lived there.

Q. And what did you find out or discover about Ms. Hughes?

A. Paula Hughes was a methamphetamine user and she used her residence for drug trafficking. She—there was a vehicle who would drop off the methamphetamine and there was also a pick up vehicle as well.

Q. Did you conduct any surveillance of Ms. Hughes' residence?

A. Yes, sir.

Q. And what did that surveillance reveal to you?

A. It revealed that a pregnant female lived in the shed which I had information on before and I actually saw her walking from Paula Hughes' residence to the—a gas station on Avenue K and 18th Street West.

Q. Now, you mentioned a minute ago that you received information concerning Ms. Hughes from informants, correct?

A. Yes, sir.

[68]

Q. Did you ever receive any information that established any connection between Ms. Hughes and Mr. O'Dell from an informant?

A. Yes, sir.

Q. What did you receive?

A. Ronnie O'Dell frequented Paula Hughes' house along with another house that was on the same street.

Q. Now that -- the other house on the same street, that's 18th Street?

A. 18th Street West. Yes, sir.

Q. Were you ever part of a team that went to that other house on 18th Street to do a parolee check?

A. Yes, sir. When I was on land cap we conducted a parole compliance check.

Q. And can you tell us about that?

A. There was two residents there. I believe her name was Rose Larson, her husband let.

Q. Zellman?

A. Zellman, yes, sir. And then they allowed a parolee who's name was Dilbert Parks—I can't recall his first name—who lived there, and we were doing a parole compliance check on Dilbert Parks.

Q. And what was revealed during that compliance check?

A. During our check we recovered methamphetamine and arrested Dilbert Parks.

[69]

Q. Did you receive any information while at Rose Larson's house about Mr. O'Dell?

A. Yes, she was familiar with O'Dell. O'Dell frequented her residence along with Paula Hughes' residence.

Q. Were any belongings of Mr. O'Dell located at the house during that compliance check?

A. I don't recall.

Q. Okay. So going back to outside the Albertsons you received the information—you mentioned from the informant—and that involved Mr. O'Dell, correct?

A. Correct.

Q. What did you do after receiving that information? What was your next step?

A. The next step was I conducted a briefing and relayed the information that there was a male white adult that matched the description of Ronnie O'Dell and the bike in front of Paula Hughes' residence, and I also advised the deputies that Paula Hughes lived in the residence that her boyfriend stayed at her residence at times that there was sheds in the backyard and there was a male hispanic named Angel that lived in one of the sheds along with a pregnant lady.

Q. Okay. Now when you were delivering this information who were you talking to?

A. Deputies.

Q. Okay. How many deputies were there in the area where

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[71]

CROSS-EXAMINATION

BY MR. DREXLER:

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[77]

Q. Okay. And the intent was so that you're telling everyone present something that you want them to hear, right?

A. Correct.

Q. And Deputies Conley and Pederson were present?

A. I could not tell you what deputies were right in front of me.

Q. Okay. And you told them that a male Hispanic named Angel lives in the shed along with his female pregnant lady, correct?

A. Correct.

Q. Okay. And that was based on both information that you personally observed in land cap when you're doing surveillance and confirmed secondarily by an informant?

A. It was confirmed by two informants and the fact that I saw a pregnant lady was confirmed by my observation leaving Paula Hughes' residence.

Q. Now, you also told everyone there that Ronnie O'Dell frequented the house of—houses of Rose Larson and Paula Hughes?

A. Yes, sir.

Q. Okay. Now, did you ever see Ronnie O'Dell at either of those locations?

A. No, I didn't.

Q. Okay. Did any other officer—to your knowledge—report seeing Ronnie O'Dell at either of those locations?

* * *

[83]

THE CLERK: Please be seated.

Please state and spell your name for the record.

THE WITNESS: Jennifer Balice; J-E-N-N-I-F-E-R, B-A-L-I-C-E.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. HURRELL:

Q. Deputy Balice, your maiden name is Pederson; is that true?

A. That's true.

* * *

[86]

Q. So she got off the phone, did she speak to some of the deputies there?

A. Yes.

Q. And what did you overhear her say?

A. That we were—a reliable informant had seen Ronnie O'Dell on 18th Street and that we were going to go check for Ronnie O'Dell at two houses where he's been associated with, been known to hang out in. That's basically it.

Q. Did you hear anything else about either of the two houses the deputies were going to deploy to?

A. She mentioned that they were possibly involved in narcotics activity and that there was a lot of traffic—which would be pedestrian traffic—to and from either or of those houses.

Q. Now, were you given an assignment to go to one of the two houses?

A. Yes, we were broken up into two teams. And the team that I was on was supposed to go to Paula Hughes' house.

Q. And did Deputy Rissling say anything about any individual that was known to be living in the house other than—excuse me—living on the property other than Ms. Hughes?

A. Inside her home?

Q. No. Anywhere on the property?

A. She said that there's—were people that sometimes hung [87] out in the back or—I don't recall her saying lived in the back it was hung out in the back.

Q. And so after the briefing in the back of Albertsons, did you go with your team members to Ms. Hughes' house?

A. Yes.

Q. And when you got there what was the first thing you did?

A. Deputy Conley and I went up the side of the house which would be the south side. We walked.

Q. What was your assignment that you were given to do?

A. Our assignment was to clear the backyard and make it safe and also to keep an eye on the back door of the home on the chance—off chance that Ronnie O'Dell was there, and he didn't run out the back.

Q. So I'm not going to show you the photographs again that we've seen, but can you tell me how did you go make your way in to the rear of the home?

A. We walked west down the side of —the south side of the house.

Q. And were there sheds on that side of the house?

A. Yes.

Q. And what did you do relative to those sheds, you and Deputy Conley?

A. We checked each shed to make sure that there was nobody or no person or anybody hiding in those sheds.

Q. Can you tell me how did you do that? Give me some [88] specifics about were your guns drawn? Were they not?

A. Guns were drawn. We were dealing with a parolee at large who's known to be armed and dangerous. On the off chance that he was in one of those sheds I wouldn't want to take the chance that

he would try to hurt us to avoid capture, so guns were drawn. Fingers were not on the trigger, because we're taught if you're not on a target, you're not on a trigger get.

Q. I just want to step back for a minute.

At the briefing were you shown a picture of Mr. O'Dell?

A. Yes.

Q. And was it a flyer of sorts?

A. Yes.

Q. And did it have information on it concerning Mr. O'Dell's criminal history?

A. Yes.

Q. And I showed the flyer a few days ago on the projector and I can't find it right now, but did you recognize that flyer as being similar to the one you saw?

A. Yes.

Q. Okay. Going back to the sheds in the south side of the property. You and Deputy Conley approached those sheds with your guns drawn and made sure there was nobody in side?

A. Yes.

[89]

Q. And then how many of the sheds were there?

A. In the entire yard?

Q. No, on the south side of the property.

A. Three.

Q. After you got done clearing those sheds, what did you do next?

A. I did tell Sergeant Minster that we were going to check the rest of the yard.

Q. Was the back door of the residence open at that point in time?

A. Yes.

Q. So then you went and checked the rest of the yard?

A. Yes.

Q. Now, you've seen photographs of the four sheds, correct?

A. Correct.

Q. When you approached that shed did you have any thought or—at that point in time that people—

that would be the kind of a structure where people would be living?

A. No.

Q. Can you describe what—I guess I shouldn't ask that. We've seen photographs and know what the landscape looks like, but as you approached that shed what did do you to position yourself?

A. We saw that it had a door so we're not trained again to stand in front of a door in case there is a threat behind [90] that door, so we approached it off to the left side of the door. Which would have been the south—the east wall of the shed.

Q. And where was Deputy Conley standing relative to you?

A. Conley was in front of me, but I wasn't directly behind him on the off chance something happened. I didn't want to hurt him.

Q. What did you see Deputy Conley do?

A. He—well, we approached the door together, and he reached out and opened the door.

Q. And did—were you able to see inside the structure after he did that?

A. Yeah, it was dark inside of it.

Q. What were you able to see?

A. A barrel of a rifle pointed at Deputy Conley.

Q. And what was your state of mind at that point in time? What were you thinking when you saw that rifle?

A. I was thinking that whoever was in that shack had a rifle, did not want us to come in there. They were going to shoot us, and possibly kill one or both of us?

Q. Were you in fear of your own life and Deputy Conley's?

A. I was more in fear of Deputy Conley's life than my own because he was ahead of me, and he had directed—like directly at him so—but yes, both of our lives.

Q. What did you do then?

[91]

A. Almost—I can't even give you a time estimate it was almost immediate. I started firing. The direction the barrel was pointed towards us.

Q. Rather than firing, did you have any other option that you felt was available to you?

A. No.

Q. And how many shots did you fire?

A. Five.

Q. And can you describe as you're shooting your weapon, what are you doing? What's your body movement?

A. We're moving backwards and to our left to get away from the threat.

Q. And after you shot those five shots, what happened then?

A. We could hear a person yelling so we quit firing, because we knew that, you know, obviously the person was in pain. And we called him out of the shed, told him to come out.

Q. Did you know at that time that there was somebody in there with him?

A. No.

Q. When did you find that out?

A. When he said my girlfriend—something to the—that his girlfriend was in there as well so we called her out also.

Q. Did you ever see a female inside the shed—

[92]

A. No.

THE COURT: I'm sorry. Clarify that question, Mr. Hurrell. I think I know what you mean by just go back—when precisely are you referring to when you asked that question?

BY MR. HURRELL:

Q. At the point in time that you saw the rifle until you stopped shooting, did you ever see anybody else—a female in the shed?

A. No, we had no idea there was someone else in there.

Q. Did the female come out of the shed?

A. Yes.

Q. And did Mr. Mendez eventually come out of the shed?

A. He came out before she did.

Q. And at that point in time did people start attending to him medically?

A. Yes.

Q. Now, before you—before Deputy Conley opened the door of the shed, you—neither of you announced your presence?

A. No.

Q. Why not?

A. That shed did not look like anybody would be possibly living in it. And also had Ronnie O'Dell been anywhere in that yard be it in a car, in a shed, behind a bush, we would never announce ourselves so that Ronnie O'Dell or anybody [93] else could have an idea of where we were. In case he was there or anybody else with a weapon or some kind we wouldn't want them to know our location. It's not safe for us and it wouldn't even be safe for – let's just hypothetically say he had a gun—the neighborhood, because we were surrounded by other homes that puts everybody in jeopardy.

Q. In the weeks following this shooting incident, how are you doing emotionally?

A. Bad. Terrible. I mean, we don't think every day that that's going to happen. And we train for it we hope it doesn't happen. But just like, you know, like, same thing Conley said sleeping wasn't happening. Just my—I was—my adrenalin was getting me pretty bad, because like I said, we train for that to happen but you—a lot of times hope it doesn't.

MR. HURRELL: Thank you very much.

THE COURT: Cross-examination.

MR. DREXLER: No questions, Your Honor.

THE COURT: Deputy, you're excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: Anything—any—I'm sorry. Does the defense rest?

MR. HURRELL: Yes, Your Honor.

THE COURT: Any rebuttal case?

MR. DREXLER: No, Your Honor, except I would—I [94] don't know if the court—I know you're very busy—has had a chance to read Rose Larson's deposition, which was admitted into evidence but that would be the focus of any rebuttal.

THE COURT: I have not read it. It is up here on the bench for me to read. I've not forgotten that I have an obligation read it, and I do intend to do so. So anything else?

MR. DREXLER: No, Your Honor.

THE COURT: All right. What is it—how do the parties want to proceed in terms of their oral arguments?

MR. DREXLER: Your Honor, Mr. Hurrell and I discussed this and we both agree that we should wait, and the court has invited us to do briefing. I would request for a number of reasons, including that I have three trials—coming up, a rape case on Monday in Orange County, followed by medical malpractice case on the following Monday following by one on the

following Monday that you expand what—or merely would be a tighter briefing schedule to permit time and opportunity to address the legal points. So if it's possible to have a briefing schedule that might expand as much as 30 days that would be appreciated from my end.

THE COURT: All right. I will ask that written oral arguments be submitted to me, no more than 15 pages, by Monday, April 1st. And I really would like these to focus on the law because, you know, you'll have the—I've heard the [95] facts and you'll have the opportunity to address the facts in your oral argument. Some of the issues have just occurred to me being here—it's clear have occurred to the parties as well—which is first of all what was the Fourth Amendment status in regard to the Hughes' residence? But then also what was the Fourth Amendment status in regard to the structure?

I've noticed that when somebody wants to indicate it might be a dwelling that we tend to in the trial and sometimes I fall into the same thing. It's been a shack and then was similar to the other three structures, it's a shed. I'm trying to be very neutral here in how I refer to it. And to say that is the 4th structure of which we've heard so much testimony.

Did it have its own curtilage? If there had been exigent circumstances for the residents, did they apply to the property as a whole? Was there—and then of course knock notice, whether knock notice was required or not. And then obviously what is the effect of qualified immunity, I denied summary judgement

on that basis, but that doesn't mean that it's not something that could determine the outcome of the case here on that.

Let me just say I don't feel with any civil parties I force settlement beyond what's contemplated by the local rules of this court and the court's ADR policy, so I think [96] the Seventh Amendment indicates that civil disputes are to be resolved by a trial, potentially a jury trial. Here all of you decided that you were willing to have me do that and I'm prepared to discharge that responsibility, but I will say you do have some time now—having heard the evidence—to determine whether all of you together can reach another result.

And I'll--in fact, say the same thing that I would say to the parties in a small claims case, when I was a temporary judge in the superior court, and of course I don't mean at all that this very serious and significant matter is otherwise at all like a small claims case. But the fact is as attentive as I tried to be and as scrupulously as I'll go about rendering a decision, I was not there.

I will never know the facts as well as all of you know them. And if by asking for my judgment you are asking for a judgment according to the law and to the facts but that will be a harsh judgment. It is not a judgment which it might be considered fair in the sense that an arbitrator would give a judgment because the law and the facts might very well be—there's no halving—cutting the baby in this case.

Mr. And Mrs. Mendez, there is a doctrine that I refer to called qualified immunity which does give a lot of protection to law enforcement officers going about their [97] duties and as unfair as that might seem to you if this ultimately came down to that it was a terrible mistake it might well be that the law indicates that the two of you are the ones and not the deputies and through them the county of Los Angeles are the ones who have to bear the consequences financially of that terrible mistake obviously no amount of money can undo what was done—or Mr. Mendez give you your leg back—and the law recognizes that and I know you recognize that as well.

Deputies, obviously, you have to recognize having heard the evidence that there are a couple issues here even with the protection of the law potentially gives you qualified immunity. One of which is which version I decide is more plausible in light of the evidence as to what exactly was happening in the structure in regard to what Mr. Mendez was doing, what actually was happening with the BB gun and all of that.

And the other thing that you have to keep in mind is even apart from that, the fact that whether or not you knew it or—I'll have to decide whether you knew it and whether you should have known it, that it was, in fact, a dwelling and the Second Amendment gives Americans the right to have firearms in their own home for their protection. And this is particularly true out in the Antelope Valley where there's obviously a lot of ex military and a lot of ex law [98] enforcement. But any American can sleep with a

firearm, many Americans do. Some of the sub text in this case whether it was to shoot rats or whether it was because of the methamphetamine, I don't really care about that.

The fact is that Mr. Mendez had the right to have it there. And if you're going to go in someplace without knock notice and without a warrant then there's plenty of bedrooms where it would have been a real gun and regardless of what was happening here it would have been a real gun, and the person in there really would have been aiming to shoot you and might very well have done so. It is not necessarily clear in that case that the person would have been wrong to have done so.

So both sides like I said, I'm prepared—you've asked for my judgment and the four of you are going to get my judgment, but it is going to be a harsh judgment. I'm not going to order you to try to settle the case. I'm not going to order you to go to a settlement conference. I just want to point out that that's the case, that those are the realities here, and you have a month to decide what it is that you want to do.

So with that, I will await your briefing and I will set the matter for closing argument and until then, I will keep an open mind. Obviously there are a lot of legal issues that I don't know what the law is and there are a lot [99] of factual issues that I'll just have to very carefully go back with the guidance of the closing arguments to decide what my view of the evidence is. Until that I don't know what my findings

of fact and conclusions of law will be, but I do know that two of you are going to be extremely upset and unhappy with the verdict and the judgment that the court will enter.

Thank you for your efforts, counsel, on behalf of your clients.

Anything else?

MR. DREXLER: No, Your Honor.

THE COURT: Mr. Hurrell.

MR. HURRELL: The only thing that we just need to do some housekeeping in the next couple days is the exhibits as to what comes in.

THE COURT: Confer on that and then before the briefing you can just even e-mail a list or send a—drop off a marked up exhibit list, whatever it is, it doesn't have to be formal whatever you find convenient in that regard. All right. Thank you very much.

MR. HURRELL: Thank you, Your Honor.

MR. DREXLER: Thank you, Your Honor.

(End of proceedings.)

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UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF TRIAL, DAY 5

LOS ANGELES, CALIFORNIA
APRIL 19, 2013

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* * *

[5]

MR. DREXLER: I think, Your Honor, altogether and how I envision this, and perhaps I should get some direction from the court before we start, first of all, I did want to introduce Marcel Stewart, who is a civil rights attorney, appellate attorney.

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THE COURT: All right. With that, then—and you may reserve some of that time to speak last, Mr. Drexler, since that's the plaintiff's right, and now you may begin your argument.

MR. DREXLER: May it please the court and counsel.

* * *

[39] regardless of what findings the court were to make as to exactly what was happening with the BB gun, it would have been sufficient under an objective standard to justify the shots.

So do you have any comments on that?

MR. STEWART: Yes, Your Honor.

I think what the court has to do is to really give a lot of thought to what created that incident, because it would be hard for me to argue to the court that if officer saw an individual with a gun or believed that individual was pointing it at them that they couldn't shoot. That's not really the argument that we're making letting—that would be, perhaps, an unreasonable argument to make. Instead, Your Honor, the argument is that in this situation the officers—they created that, and that's the problem that then makes their actions unreasonable that they created. So in terms of this idea, this law that the officers can't both create the situation, then benefit from it—I believe we had cited to the driver, the Ninth Circuit case, in our brief. And so that's the issue there, Your Honor.

The other issue, it goes back to the foreseeability issue in terms of the entry itself that, again, I was foreseeable that a person might try to defend themselves in unannounced situation where they may believe it's intruders. So I think there are a couple different ways that the court

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[40]

THE COURT: Thank you.

Let me hear from the defendants.

MR. HURRELL: Good morning, Your Honor.

* * *

[49] expert that was never disclosed or—apparently to either side, from what I understand.

And also dealing with the issue of damages, the—to the extent that this is a loss of consortium claim, there was testimony on that aspect of damages at trial. They—the Mendezes were not married at the time, so I don't think that's a viable claim.

THE COURT: All right. Counsel, let me ask: Here, there are factual issues involved on whether the deputies should have realized that this was being used as a residence. And, in that sense, you know, given—especially since there's a Second Amendment right to have firearms in the home for protection, you know, there must be hundreds of thousands of bedrooms in which if law enforcement or anyone, you know, went in without announcing themselves would have provoked reaction. You know, there's many, many people, you know, sleep with firearms within arms' reach. It's not a rare occurrence.

So what—in view of the law, you know, what effect does that have—you know, it's not that he was walking up to someone in a parking lot or something and then he swung around a BB gun or a toy gun or, you know, other very tragic circumstances that occur. You know, this is something where it did occur in what—there is evidence that would allow the court to determine that it was a [50] residence and that the officers should have understood it to be such.

So what's the defense view, then, if the court were to take that view, what is the defense view of what the law is under those circumstances?

MR. HURRELL: I knew you were going to ask that. And I don't think it impacts the case because I think the analysis of Deputy Conley's and Deputy Peterson's actions, and I think there probably are a lot of cases involving private individuals that intrude on somebody's home and gets shot in the process and the right of individuals to bear arms to protect themselves. But given that we're dealing with two police officers, who I would argue, were acting appropriately, that Second Amendment issue really doesn't come into play.

But factually speaking, though, we know that Mr. Mendez was not trying to protect himself by his own testimony. And, in fact, he was used to having the door of the shed abruptly opening up by Ms. Hughes. So I don't even think factually there was an effort being taken on his part to protect himself, according to his testimony.

THE COURT: All right. In regard to that, what about the argument that was raised where in a sense the deputies, you know, sort of provoked this to provoke the reaction or that—not necessarily in a legal sense that [51] there's a search and seizure claim separate from an excessive force claim, but that their actions in going in there sort of set up the—Mr. Mendez's startled response, which then provoked the fire. I mean, what's—and that—how—legally, what's the response to that argument that the sort of Fourth

Amendment issues or the search and seizure issues kind of inform the excessive force analysis?

MR. HURRELL: Well, legally, I don't think it can because, again, it goes back to tactics leading up to the situation. But, factually, I just think it's tragic. It's unfortunate what happened. And I don't think there's any way to explain it other than that. That—I think if we analyze the deputies' conduct was appropriate, Mr. Mendez conduct, he didn't do anything wrong either. I just think the outcome was tragic, but in terms of an analysis under the applicable law, there's immunities that protect the deputies from this situation.

THE COURT: Anything else on behalf of the defense?

MR. HURRELL: That's it, Your Honor.

Thank you.

THE COURT: All right. I will hear from the Plaintiffs.

MR. STEWART: Your Honor, I'll try to be brief, the first point that's very important for the court to understand is that it's not really about what's in Deputy Peterson or

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF COURT TRIAL VERDICT

LOS ANGELES, CALIFORNIA
AUGUST 13, 2013

ROSALYN ADAMS, CSR 11794
FEDERAL OFFICIAL COURT REPORTER
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[3] Los Angeles, California; Tuesday, August 13, 2013; 3:00 pm

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THE CLERK: in the matter of case number CV 11-4471-MWF: *Angel Mendez, et al. v. Leroy D. Baca, et al.*

Counsel, please state your appearance for the record.

MR. DREXLER: David Drexler on behalf of the plaintiffs, Your Honor.

MR. DREXLER: Jonathan Drexler on behalf of the plaintiffs.

THE COURT: Good afternoon.

MR. HURRELL: Good afternoon Tom Hurrell and Erica Bianco for defendants.

THE COURT: Good afternoon. We're here for me to deliver a verdict based on findings of fact and conclusions of law. Those are—will be placed on the docket later today. I have an unsigned copy, which I'll make available through Ms. Sanchez after this hearing.

The purpose of my remarks is simply to summarize the findings of fact and conclusions of law and then read the verdict. If anything I say appears to be in contradiction to the findings of fact and

conclusions of law, that was simply my mistake. It's my desire to simply summarize them, and, of [4] course, the actual findings of fact and conclusion will control.

The verdict will be for the plaintiffs. And let me briefly explain why that is the case. If the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants.

The law, as I mentioned at trial, is certainly favorable towards the police in these circumstances due to a variety of doctrines. Weighing the testimony and the evidence, it was clear to me that, while Mr. Mendez was not aiming or attempting to shoot at the police that, even if his view of what happened was credited that inevitably the BB gun would have appeared reasonably to the deputies to be a small caliber rifle, would have appeared to be pointing at them and they would have had the right to fire.

The fact I'm even saying that shows what a tragedy this is and that, obviously, the deputies in the way it would ordinarily be meant did nothing wrong; they were obviously not intentionally trying to cost Mr. Mendez his leg.

And the real question here is, given this regrettable tragedy is going to be—the defendants is going to be—Mr. and Mrs. Mendez who have to bear the weight of that and my conclusion is that it is going to be the defendants.

[5] Moving back from the moment of shooting, the Fourth Amendment unreasonable search claim based on the warrantless entry is a valid claim, but would in and of itself be only worth a dollar in nominal damages since the act of pointing the BB gun would have superseded that claim as far as damage is concerned.

Likewise, the claim under the Fourth Amendment of an unreasonable search based on the failure to knock and announce is a valid claim; but would, in and of itself, be worth only a dollar in nominal damages. The reasons those were constitutional violations is that the law of the court of appeals with jurisdiction over this court, the Ninth Circuit, makes it clear that, even if there had been a warrant and even if there had been probable cause, which there was not, that when there is clearly a separate dwelling then that is—that requires its own separate warrant and its own separate knock and announce.

The real issue here, then, is why the shooting took place. There is a doctrine within the Ninth Circuit Court of Appeal case law based on the cases of *Alexander* and *Billington* that is the unconstitutional actions of the deputies provokes the incident, then the defendants are liable. And having weighed the evidence and having looked at all of the cases decided within that doctrine within the Ninth Circuit, I have determined that that is what occurred [6] here.

Were it not for the unconstitutional search and the unconstitutional failure to knock and announce,

then. obviously. Mr. Mendez would not have been startled; he would not have reached for the BB gun. and this whole incident would not have occurred. Even with all of that. ordinarily the defendants would still prevail in this case because, not only did they have to conduct something to have unconstitutional conduct, but it had to be reckless, or as for the reasons I set forth in my findings of fact and conclusions of law. In other words, it had to be—there had to be something unreasonable about it. And here—this was the most important issue in the case—was whether the failure of the deputies to recognize the shack as a dwelling was reasonable. And I have found and do now find that it was not.

That was for several reasons that run together: First, of course, is that at the briefing before the search there was an announcement that somebody was living in the back of the property. Also, although I paid close attention to the testimony of the deputies, especially Deputy Pedersen saying that looking at the shack it simply did not seem to her the sort of place where somebody would live. I believe that she was sincere in that testimony but, nonetheless, that view was unreasonable. That shack was in a different part of [7] the yard than the three sheds that were searched. It looked different. It had a—there was a blanket over the door and then there was a screen door; there was the wood door. Those things were open. There was a water hose going towards it. There was an electrical cord going towards it. There were the clothes outside. There were quite a few indicia that it was. in fact, a dwelling. It was, obviously, not a traditional dwelling and it was not something I

think most people in Los Angeles County would want to live in, but the fact was that it was where Mr. and Mrs. Mendez were living. And the law based on the clear case laws existed at the time, it deserved the dignity of being treated as a home.

Had that mistake, that this was a storage shed and not a dwelling, been a reasonable one then the verdict would have been for the defendants. It was not reasonable and, therefore, the verdict is for the plaintiffs.

Accordingly, in my findings of fact and conclusions of lawsuit, the verdict will be as follows: In favor of the plaintiffs, Mr. and Mrs. Mendez, and against defendants: Deputies Conley and Pederson, on the Fourth Amendment unreasonable search claim based on a warrantless entry, the court awards Mr. and Ms. Mendez $1 in nominal damages.

As discussed above, only Deputy Conley is liable on this claim. On the Fourth Amendment unreasonable search claim based on failure to knock and announce, the court [8] awards Mr. and Mrs. Mendez $1 in nominal damages. As discussed above Deputies Conley and Peterson are jointly and severally liable on this claim.

On the Fourth Amendment excessive force claim, based on conduct at the moment of shooting, the court rules in favor of Deputies Conley and Pedersen.

On the Fourth Amendment excessive force claim, based on *Alexander* and *Billington* provocation, Deputies Conley and Pedersen are jointly and severally liable. On this claim the court awards the following damages. To plaintiff Angel Mendez, the sum of $3,876,516 as follows: past medical bills of $721,056; prosthesis upkeep and replacement, $407,000; future surgeries, $45,000; and psychological care for five years, $13,300; attendant care $648,240; loss of future earnings, $241,920; and noneconomic damages, including his pain and suffering, $1,800,000.

For plaintiff Jennifer Lynn Garcia: past medical bills of $95,182; future medical care of 37,000; noneconomic damages of 90,000, for a total of $222,182.

As I state in my findings of fact and conclusion of law, the noneconomic damages—I, considered those factors which traditionally in the common law give rise to noneconomic damages. In terms of the facts, I was mindful of the testimony of Mr. Mendez that, given the many hardships that the loss of his leg has created, it seems to me that the [9] gist of your testimony, Mr. Mendez, was the loss of dignity and self-sufficiency that that created, and my thought was with the sum of the noneconomic damages, the other damages will go a long way towards making you financially whole. With that, it will be up to you how to spend that money, but if it's invested prudently, then that would give you a sufficient return that, without working, you would be able to maintain for your family a middle-class life and I hope that that

will restore to the extent that the law can do so the sum of the dignity and the self-sufficiency that you feel that you have lost.

Mrs. Mendez, in awarding you the noneconomic damages, I was mindful of the fact that, not only were you injured but that you were pregnant at the time, and I'm sure that caused you much more concern and grief than would have been the case if that had not been true at the time.

So that is the court's verdict. I will enter a separate judgment embodying this verdict a week from today. If either party wishes to submit a proposed form of judgement before a week from today, I will consider that in preparing the judgement.

Mr. and Mrs. Mendez I wish you good luck. And I commend counsel on their trial of the case. Thank you.

(End of Proceedings.)
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UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE
PRESIDING

ANGEL MENDEZ,
ET AL.,
PLAINTIFF,

VS. CV 11-4771-MWF (PJWX)

LEROY D. BACA,
ET AL.,
DEFENDANT.

REPORTER'S TRANSCRIPT OF MOTIONS HEARING

LOS ANGELES, CALIFORNIA
NOVEMBER 18, 2013

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[3] Los Angeles, California; Tuesday, November 18, 2013; 11:21 am

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THE CLERK: Calling item no. 3, case number CV 11-4471-MWF: *Angel Mendez, et al. v. Leroy D. Baca, et al.*

Counsel, please state your appearance for the record.

MR. DREXLER: Good morning, Your Honor. David Drexler and Jonathan Drexler on behalf of plaintiffs.

THE COURT: Good morning.

MR. HURRELL: Good morning, Your Honor. Tom Hurrell and Erica Bianco for the defendants.

THE COURT: Good morning. Let's take up the motion to amend the judgment and then the attorneys motion.

All right. Mr. Hurrell, on the order for denying your motion, you know, what this comes down to is a couple things. The first is I did put a lot of work and thought into the findings of fact and conclusions of law, and I think any district judge is going to be reluctant to disturb that. And then the second thing here is I wonder if I almost made a mistake in trying to go through analytically well, if x, then y. If you took this view of the law or the facts, then this [4] would

be the analysis and kind of trying to cover the basis as if it was, you know, going to get published in, you know, Professor Lafave's treatise or something. And what this boils down to is that making a mistake of fact that is—brings it outside of qualified immunity the deputies did not view this as a residence and ignored the law, which clearly states that as a separate residence it enjoyed constitutional protections.

I mean, what happened here is that they went through the three sheds, found nothing, saw nothing for reasons that are not supported by common sense or the evidence, treated this shack as a similar to the shed despite the fact, among many other facts that are detailed in the findings of fact, that they had been told that it was a separate residence and that there were people there on the property and then proceeded to go in as they did in violation of really not only the Fourth Amendment, but actually the Second Amendment, as well. As you just said, most Americans, especially those Americans who are numerous, who keep a firearm in their bedroom for their own protection, that law enforcement could just barge in without a warrant and then shoot your leg off just because you were startled and tried to respond, I think they would be shocked by that.

So, you know, that's what this boils down to. And I—while I considered the various points that you made [5] carefully and tried to respond to them in that light, that's what we've got here.

I mean, what—it really isn't a legal issue in a way because of cannon and because of the *Alexander* and provocation issues, but also it's really a factual issue, which is that they just made this glaring mistake which was not reasonable enough to gain them qualified immunity. So, in light of that, I have not seen anything in the papers to make me change my mind about that.

But, again, if you wish to—there's two things I'd like to hear from you on. One is if in any of the—you have a problem with any of the specific things that are in the tentative, you know—and then the second thing is if there is specific evidence in favor of some of the specific requests you've made that I've overlooked, then, you know, if you could say, well, this person testified that way on such and such a date or something like that, then I'll take another look at that.

MR. HURRELL: Your Honor, the moving papers and the reply papers I think sufficiently put forth my arguments and your tentative is well thought out. I just obviously disagree in the implications the factual findings can be drawn to conclude to, and I don't think that—for instance, just one being that the deputies should have realized that this shack was a separate residence from the home, you know, [6] I think we disagree on the facts at trial in terms of what the shack looked like, whether a reasonable officer would have believed somebody was actually residing in that as a permanent residence. I think for today's purposes, I'll submit on the record

that we advanced the court and I appreciate all the thought you put into the tentative.

THE COURT: Right.

And, you know, the fact is that maybe if I've made a mistake, that's what the court of appeals is there for. I just am really not—just in general not inclined to reopen it, but I did look at the individual, you know, arguments that you were making and I hope I've responded in that way.

All right. That is taken under submission.

So, now, there is the motion for attorneys' fees, and on that I will hear from the plaintiffs.

MR. DREXLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. DREXLER: Well, similarly, this has been briefed and you have all of our points and arguments as well as the hours that are there. The only part that I would very briefly like to address, your honor, respectfully, is the decline to go give any multiple or multiplier as part of the lodestar calculation. While it is true that I took on this case, perhaps, courageously, lacking civil rights experience, especially trial experience, and perhaps the number of hours

RECORD AND BRIEFS

No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Two Sheriff's Deputies searching for an armed fugitive opened the door to a backyard shack to be confronted by a man pointing a gun at them. Fearing for their lives, they discharged their weapons. The courts below found—and the parties all agree—that the shooting was reasonable under the Fourth Amendment framework this Court set out in *Graham v. Connor*, 490 U.S. 386 (1989). Nevertheless, the Deputies have been held personally liable under the Ninth Circuit's so-called "provocation rule," on the ground that they provoked the confrontation by failing to secure a warrant to search the shack. The questions presented are:

1. The Ninth Circuit's provocation rule holds officers liable under the Fourth Amendment for objectively reasonable force, vitiates qualified-immunity protections, and permits tort liability in the absence of proximate cause. Should this Court reject the provocation rule and continue to analyze police use of force under the established legal framework set out in *Graham*?

2. The Court of Appeals held alternatively that the Deputies were liable for the shooting "under basic notions of proximate cause." Did the court err in holding that the failure to secure a warrant proximately caused the shooting, particularly where the Deputies shot in reasonable self-defense after one of the Plaintiffs pointed a gun at them and the outcome would not have changed if the Deputies had a warrant?

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals affirming in part and reversing in part the judgment of the district court is reported at 815 F.3d 1178 and reprinted at Pet. App. 1a-26a. The district court's unpublished findings of fact and conclusions of law are available at 2013 WL 4202240 and reprinted at Pet. App. 55a-136a.

JURISDICTION

The Court of Appeals entered judgment on March 2, 2016, and denied rehearing on June 23, 2016. The petition for a writ of certiorari was timely filed on September 16, 2016, and granted on December 2, 2016. This court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

INTRODUCTION

It was a tragic happenstance.

Petitioners Los Angeles County Sheriff's Deputies Christopher Conley and Jennifer Pederson (the "Deputies") were dispatched to a specific address to locate a fugitive considered armed and dangerous. In the backyard, they encountered a run-down shack. The district court found—and for present purposes, it is undisputed—that the Deputies had probable cause to believe the fugitive was in the shack. So they opened the door to peer inside. What they saw was every officer's nightmare: a man pointing a gun at them at point-blank range. What they did is what every officer is trained to do: They fired their weapons in self-defense. The courts below found—and all the parties agree—that this response was reasonable.

Yet, the Deputies have been hit with millions of dollars in personal liability for excessive force. Turns

out, the man in the shack was not the fugitive, but a homeless man using the shack as shelter. He was not holding a rifle, but a BB gun. And he was not intentionally pointing it at the Deputies, but shifting it as he sat up thinking the homeowner was at the door. The Deputies peered in at the worst possible moment.

Everyone agrees that the Deputies did not use excessive force under the standard this Court has been following for 25 years. Under *Graham v. Connor*, a court must put itself in the shoes of a reasonable officer on the scene and, without the benefit of hindsight, evaluate the reasonableness of the Deputies' conduct "at the moment" they applied force. 490 U.S. 386, 396 (1989). The only way the Ninth Circuit was able to find the Deputies liable for their *reasonable* use of force was by rolling the clock back to before that critical moment. The court invoked its so-called "provocation rule," which holds an officer liable for the use of otherwise reasonable force if the officer provoked a violent confrontation.

The supposed "provocation" here was that the Deputies did not secure a search warrant before opening the shack door. Never mind that there was nothing provocative about that or about the manner in which they opened the door; the Ninth Circuit held that no actual provocative conduct is required, just a constitutional violation that was in the chain of events eventually leading to the shooting. And never mind that the shack's occupant was not provoked to violence at all.

As this Court has observed, circuits have "sharply questioned" the provocation rule. *City & Cty. of San*

Francisco v. Sheehan, 135 S. Ct. 1765, 1776 n.4 (2015). The vast majority of them reject it. This Court should as well. Officers need to be free to make split-second decisions to respond to threats of force without hesitating to replay all their prior actions to assess whether someone might later accuse them of provoking the confrontation.

This Court should also reject the Court of Appeals' alternative holding that the failure to secure a search warrant proximately caused the shooting. Search warrants are designed to protect privacy interests; they are not designed to prevent injuries due to use of force. And the outcome here would have been the same even if the Deputies had a warrant in their back pocket.

STATEMENT OF THE CASE

Police Search For A Wanted, Armed-And-Dangerous Parolee

On the morning of October 1, 2010, a Los Angeles police officer reported that he believed he had seen a missing parolee at a grocery store. Pet. App. 57a. The parolee, Ronnie O'Dell, was wanted on felony charges, including child endangerment and evading capture. *Id.*; JA 74. Twelve officers, including a special team charged with tracking and apprehending wanted parolees, responded to the scene. Pet. App. 57a-58a. They knew O'Dell "had evaded prior attempts to apprehend him" and was considered "armed and dangerous." Pet. App. 57a. By the time they arrived, O'Dell was gone. Pet. App. 57a-58a.

While the team was debriefing, an officer received a tip that O'Dell was spotted riding a bicycle in front of the nearby home of Paula Hughes. Pet. App. 58a. The team was shown a flyer that described O'Dell as "armed and dangerous" and listed his outstanding felony charges. JA 74, 214. The officers then divided into two teams: one to the Hughes residence and the other to a different house on the same street that officers knew O'Dell had previously visited. Pet. App. 58a.

The team that went to the Hughes property consisted of five officers, including Deputies Conley and Pederson. Pet. App. 59a. Although the deputy who received the tip announced to the officers that a man named Angel lived in the backyard with a pregnant woman, *id.*, Deputy Conley testified that he did not hear this announcement, JA 174, 182; Deputy Pederson recalled hearing only that some people "sometimes hung out in the back" of the house, not that they lived there. JA 212. A third officer (not a party) testified that she heard no announcement on the topic. JA 166.

When the officers arrived at the Hughes house, "they observed a bicycle on the front lawn." Pet. App. 63a; JA 77. The officer-in-charge assigned Deputies Conley and Pederson to clear the back of the property for the officers' safety, in case O'Dell was hiding there, and to cover the back door, in case O'Dell was in the house and attempted to escape. Pet. App. 59a, 63a.

The other officers knocked on Ms. Hughes's front door. Pet. App. 63a. Ms. Hughes refused to open the door, but she spoke with the officers, who told her that they were looking for O'Dell. *Id.* While speaking to

Ms. Hughes, one of the officers heard "running within the Hughes residence, toward the back of the [house]" and "believed Mr. O'Dell was [inside]." Pet. App. 64a. They prepared to "ram" the door down, but Ms. Hughes opened the door and allowed them to enter. *Id.* The officers looked through the house but did not find O'Dell. *Id.*

The Deputies Fire In Response To A Drawn Gun

Meanwhile, Sheriff's Deputies Conley and Pederson were searching the backyard. Pet. App. 65a. They were in uniform, JA 98-99, 108-09, and kept "their guns drawn because" they believed "O'Dell ... to be armed and dangerous," Pet. App. 65a. The backyard was a jumble of junk and sheds. A large, dirt-covered area was littered with "debris throughout," including "abandoned automobiles." Pet. App. 60a; JA 78-82 (photos). The Deputies first encountered and cleared three storage sheds where O'Dell could have been hiding. Pet. App. 65a. Then they approached a small, windowless plywood shack with a wooden door. Pet. App. 60a-61a.

JA 82.

As depicted, surrounding this shack were various odds-and-ends: a hand truck, a plastic locker with clothing, an office chair, an empty plastic tub, a step-ladder, another plastic tub with a trash bag lying on top, a hose, a shovel, and other miscellaneous items. JA 81-82 (photos); Pet. App. 61a. A thin white wire, partially obscured by dirt and garbage, ran into the shack. JA 82 (photo). An air conditioning unit, mounted into a hole, was on the opposite side of the shack, and therefore not visible to the Deputies. *See* Pet. App. 62a, 66a; JA 81 (photo).

The Deputies approached the shack's doorway. Pet. App. 66a. The shack had a screen door that was open, but its wooden door was closed. *Id.* Neither Deputy "perceive[d] the shack to be a habitable structure"; rather, both "believed the shack to be simply another storage shed," like "the three ... that they had

already searched." Pet. App. 66a-67a. "Therefore, it was their perception that the only person who might have been in the shack would have been Mr. O'Dell, trying to remain hidden." Pet. App. 67a.

Deputy Conley opened the shack's wooden door and pulled back a blue blanket obstructing the doorway. *Id.* The Deputies were instantly confronted with "the silhouette of an adult male ... holding—what they believed to be—a rifle." *Id.* Deputy Pederson thought "whoever was in that shack ... [is] going to shoot us, and possibly kill one or both of us." JA 217. Deputy Conley "thought to [him]self[:] This is where I'm going to die." JA 179.

Deputy Conley yelled "Gun!" and both Deputies began firing at the man with the gun while backing away from the door. Pet. App. 69a-70a. Consistent with their training, the Deputies fired until they perceived that "there was no [longer a] threat." Pet. App. 70a. Both Deputies stopped shooting with unused ammunition remaining in their weapons. JA 197. The whole shooting lasted only 2-3 seconds. JA 196-97.

It turns out the man holding the gun was not O'Dell but Respondent Angel Mendez. Mr. Mendez had been living in the shack with his then-girlfriend (now wife) Respondent Jennifer Garcia.[1] The couple had been napping on a futon inside the shack. Pet. App. 67a-68a. The gun Mr. Mendez pointed toward

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[1] In keeping with the convention of the courts below, we refer to Ms. Garcia as "Mrs. Mendez." We refer to the couple as "Plaintiffs."

the officers was a black BB gun that "closely resembled a small caliber rifle." Pet. App. 62a; *see* JA 89 (photo). Mr. Mendez used it "to shoot rats, mice, and other pests." Pet. App. 62a. When the door opened, Mr. Mendez thought it was Ms. Hughes playing a joke, and he grabbed the gun next to him on the futon to move it as he sat up. Pet. App. 68a. In doing so, Mr. Mendez "pointed" the "BB gun rifle ... towards Deputy Conley." Pet. App. 69a. The district court found that in the shadows of the windowless, unlit shack, the Deputies "perceived Mr. Mendez holding the BB gun rifle," "*reasonably* believed that the BB gun rifle was a firearm rifle," and "*reasonably* believed that the man ... holding the firearm rifle ... threatened their lives." *Id.*

The bullets hit Mr. Mendez in his forearm, back, hip, leg, and foot, requiring amputation of his right leg below the knee. Pet. App. 70a. Mrs. Mendez was shot in her right shoulder and grazed on the left hand. *Id.* She was pregnant at the time of the shooting and later gave birth to a healthy boy. JA 152.

The District Court Finds That The Deputies Used Reasonable Force But Nevertheless Holds Them Liable

Plaintiffs sued Deputies Conley and Pederson and Los Angeles County under 42 U.S.C. § 1983. Plaintiffs claimed the Deputies infringed their Fourth Amendment rights by searching the shack without a warrant, not knocking and announcing their presence immediately before entering the shack, and employing excessive force. *See* Pet. App. 74a-75a, 88a, 99a, 106a-07a, 109a, 135a-36a (District Court's

Findings & Conclusions); Pet. App. 52a-53a (District Court Judgment). The district court ruled for the County on summary judgment. JA 3-4.

The district court conducted a bench trial on the claims against the Deputies and found for Plaintiffs on their warrantless-entry and knock-and-announce claims. Pet. App. 74a-105a. The court found as fact that the Deputies believed the shack was uninhabitable, uninhabited, and "simply another storage shed[] similar to the three ... they had already searched." Pet. App. 66a-67a. Two other experienced officers (in addition to Deputies Conley and Pederson) stated that none of them perceived the plywood shack as a place where people might be living. *See* JA 70, 165, 176, 215-16. Nevertheless, the court concluded that Deputies Conley and Pederson's sincerely held belief was "not reasonable," Pet. App. 67a, and that they should have known the makeshift structure was a dwelling, Pet. App. 78a-85a. The court then rejected the exceptions to the warrant requirement that the Deputies had invoked—including Ms. Hughes's consent, parolee search, exigency, and emergency circumstances. Pet. App. 88a-99a. The court concluded that Deputy Conley violated Plaintiffs' clearly established right to be free from an unreasonable search. Because "Deputy Pederson, however, did not search the shack," the district court did not hold her liable on the warrantless-entry claim. Pet. App. 88a, 128a.

As to the knock-and-announce claim, having found that the Deputies should have known the shack was a dwelling, the district court held that the Deputies were obligated to knock and announce their presence a second time (after their colleagues had already

knocked and announced at the front door of the Hughes house). Pet. App. 99a-104a. The court also denied the Deputies qualified immunity, holding that the requirement to knock and announce at the shack was clearly established. Pet. App. 105a.

The district court awarded Plaintiffs only nominal damages of $1 against Deputy Conley on the warrantless-entry claim and $1 against Deputies Conley and Pederson on the knock-and-announce claim. Pet. App. 135a. The court explained that Plaintiffs suffered no harm as a result of the warrantless-entry or knock-and-announce claims. JA 238. The court elaborated that the damages Plaintiffs suffered as a result of the shooting were not compensable as part of the warrantless-entry or knock-and-announce claims because Mr. Mendez's "act of pointing the BB gun [at the Deputies] would have superseded th[ose] claim[s] as far as damage is concerned." *Id.*

As to excessive force, the court found no "violation of [Plaintiffs'] constitutional right to be free from excessive force" because the Deputies' "use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." Pet. App. 108a-09a. Indeed, the court noted that Plaintiffs had "conceded" as much in closing arguments. Pet. App. 108a (discussing JA 230). The court explained that "[i]f the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." JA 237.

The court nevertheless found for Plaintiffs on their Fourth Amendment excessive-force claim. Pet. App. 109a-23a. The court invoked the Ninth Circuit's

provocation rule, that an officer "may be held liable for his *otherwise defensive* [i.e., *reasonable*] use of deadly force" if he "intentionally or recklessly provokes a violent confrontation" through "an independent Fourth Amendment violation." Pet. App. 109a (emphasis added) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

Since the court had already found Deputy Conley liable on the warrantless-entry claim and both the Deputies liable on the knock-and-announce claim, the court concluded that the Deputies had thereby "provoked" the shooting, Pet. App. 112a, and so their "otherwise reasonable (and lawful) defensive use of force [became] unreasonable as a matter of law," Pet. App. 111a. It did not matter that the purported provocation was not intentional, Pet. App. 113a, or that the only reason the court considered the conduct "reckless" was that the search was "unreasonable under the Fourth Amendment," Pet. App. 116a, 118a, 122a. It likewise did not matter that the purported provocation was not violent—it consisted of the Deputies entering the shack by merely opening the door and moving the blue blanket without first knocking and announcing—nor that it provoked no violence from Mr. Mendez, who testified that he picked up the BB gun merely to move it as he sat up in bed. *See* Pet. App. 121a. For the district court, all that mattered was that the warrantless entry and failure to knock and announce were "predicate ... constitutional violations [that] render[ed] [the Deputies'] 'otherwise reasonable defensive use of force unreasonable.'" *Id.*

The court awarded damages of $4.1 million for Plaintiffs' excessive-force claim, even though it had

found the use of force reasonable. Pet. App. 135a-36a; *see also* Pet. App. 52a-54a (Judgment).

The Court Of Appeals Upholds The Award

The Court of Appeals reversed in part and affirmed in part. It reversed the judgment on the knock-and-announce claim. Pet. App. 18a-20a. Noting that officers had "announce[d] their presence at Hughes's front door," the court held that it was not clearly established at the time of the events in question that "the deputies needed to announce their presence again before entering the shack in the curtilage." Pet. App. 19a. The Deputies were therefore entitled to qualified immunity. *Id.*

On the other hand, the court affirmed the district court's holding that Deputy Conley's warrantless entry of the shack violated Plaintiffs' clearly established Fourth Amendment rights. Pet. App. 8a-18a.

The Court of Appeals also affirmed the district court's principal holding on excessive force. The court stressed that "the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." Pet. App. 25a. But it nonetheless affirmed the judgment against the Deputies, invoking the Ninth Circuit's doctrine that a constitutionally reasonable use of force becomes unreasonable if "an officer intentionally or recklessly provokes a violent confrontation" by committing "an independent Fourth Amendment violation." Pet. App. 22a (quotation marks omitted).

The Court of Appeals, however, did not require any actual provocation, much less provocation of "a *violent* response." *Id.* As the court observed, Mr. Mendez was "not 'provoke[d],'" did not respond violently, and "did not intend to threaten the officers with his gun"—he simply sat up in bed with his gun pointed towards the door. *Id.* For the Court of Appeals, a provocation negating the otherwise justifiable use of force "simply require[s] that the deputies' unconstitutional conduct *created a situation which led to the shooting*." *Id.* (emphasis added; quotation marks omitted). Under this approach, the court found its provocation rule applicable.

The Court of Appeals did not make any separate determination that any provocation was "intentional or reckless." Rather, the court explained that, "because qualified immunity protects all but the plainly incompetent or those who knowingly violate the law, our determination that the deputies are not entitled to qualified immunity on the warrantless entry claim necessarily indicates that they acted recklessly or intentionally with respect to Mendez's rights." Pet. App. 23a (quotation marks and citation omitted).

The court ended with an alternative holding that even if there were no provocation rule, the Deputies were still "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Though the court had already held that the knock-and-announce claim could not be the basis for § 1983 liability because it implicated no violation of clearly established law, the court found proximate cause because "where [as here] Mendez was holding a gun when the officers barged

into the shack *unannounced*, [it] was reasonably foreseeable" that the Deputies' "unconstitutional entry" would lead to a shooting. Pet. App. 25a (emphasis added). On this basis, the court held both Deputies liable for the full $4.1 million award.

SUMMARY OF THE ARGUMENT

I. Analysis of Plaintiffs' excessive-force claim is straightforward under the approach this Court has followed for 25 years. "The 'reasonableness' of a particular use of force," this Court has emphasized, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" from "the peace of a judge's chambers." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted). Reasonableness must therefore be evaluated as of "the moment" the force was used. *Id.*

There is no dispute about the result of this Fourth Amendment reasonableness analysis on these facts. This Court has squarely held: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to ... us[e] deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The district court found as fact that Mr. Mendez was pointing the BB gun "towards" the Deputies; the Deputies saw Mr. Mendez "holding the BB gun rifle"; they "*reasonably* believed that the BB gun rifle was a firearm rifle"; they "*reasonably* believed that ... Mr. Mendez[] holding the firearm rifle ... threatened their lives"; accordingly, the Deputies

"fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed" otherwise. Pet. App. 69a. That is the end of the matter.

II. The Court of Appeals held that the Deputies' indisputably reasonable use of force to protect themselves from the perceived threat of death became unreasonable under a provocation rule that this Court has never condoned. The provocation rule holds officers liable for their reasonable use of defensive force to protect themselves and others from the imminent prospect of bodily injury or death *if* some officer first committed an act that provoked no violent response but simply ended in a situation where the officers had to use force.

A. Most basically, the provocation rule is contrary to the Fourth Amendment because it declares that the use of force violates the Fourth Amendment even when the force was reasonable under—and therefore in compliance with—the Fourth Amendment. The provocation rule also overlooks that a significant component of the Fourth Amendment reasonableness analysis is the "temporal perspective of the inquiry." *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overturned in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). This Court's recent post-*Graham* excessive-force cases illustrate that the officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure. *See Scott v. Harris*, 550 U.S. 372 (2007); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Brower v. Cty. of Inyo*, 489 U.S. 593 (1989).

This Court's repeated emphasis on the "moment" of the seizure in its excessive-force cases serves an important practical purpose, which the provocation rule squanders. The "reasonableness" inquiry under the Fourth Amendment is designed to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97.

B. The whole dynamic the provocation rule creates is similarly inconsistent with critical qualified immunity protections. Under the provocation rule, a court imposes liability merely because there was "an independent Fourth Amendment violation," Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189), without ever asking whether the violation in question was a violation of clearly established law. This is no abstract concern. Although the Court of Appeals' analysis is opaque at points—particularly with regard to the relationship between the provocation rule and its causation analysis—the court ultimately imposed liability here based largely on the Deputies' *legally immunized* conduct: the Deputies' failure to separately knock and announce at the shack.

C. The Court of Appeals' provocation rule is also invalid because it does not require proximate cause—only but-for cause. Plaintiffs will almost always be able to meet that low bar. Officers will thus face potential liability for everything that happens after a predicate constitutional violation, however remote or unforeseeable the injury.

III. The Court of Appeals hedged its bet on the provocation rule by adding that "even without relying on our circuit's provocation theory," it would hold the Deputies "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. This analysis is wrong as a matter of law.

A. Injuries resulting from the subsequent use of objectively reasonable force are not within the scope of the risk of the failure to secure a warrant. Plaintiffs' only actionable constitutional claim was the failure to secure a warrant before searching the shack. A search warrant is not, however, directed at preventing physical injuries. One would not ordinarily say, "You better get a search warrant, or else people will get hurt." That is why the district court awarded only nominal damages for the Deputies' failure to secure a warrant—an acknowledgment that the violation did not proximately cause their physical injury.

The Court of Appeals at no point identified the risks the warrant requirement protects. Rather, the court skipped that critical step and merely held that it was "reasonably foreseeable" that Mr. "Mendez [would be] holding a gun when the officers *barged* into the shack *unannounced*." Pet. App. 25a (emphasis added). Here, again, the Court of Appeals was impermissibly leveraging immune conduct—the failure to knock and announce—into liability for a separate constitutional violation.

B. Even if Plaintiffs' injuries were within the scope of risk of the warrant requirement, they still could not establish proximate cause because Mr. Men-

dez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries, and therefore cut off any possibility of liability for the shooting. Under this principle, when an individual points a gun at a law enforcement officer, that is a superseding event that breaks the chain of causation from prior unlawful conduct. Officers should not and cannot be held liable for the damages resulting from their ensuing *reasonable* response.

ARGUMENT

I. Under This Court's Traditional Analysis, The Deputies' Use Of Force Was Constitutional Because It Was Reasonable In Light Of The Circumstances At The Moment The Force Was Used.

Analysis of Plaintiffs' excessive force claim is straightforward under the approach this Court has followed for 25 years. Consideration of a § 1983 claim must "begin[] by identifying the specific constitutional right allegedly infringed." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Plaintiffs claim that the Deputies' use of force violated their Fourth Amendment rights. The Fourth Amendment, however, does not govern all police conduct or tactics. It governs only "searches" and "seizures," and prohibits only those searches and seizures that are "unreasonable." U.S. Const. amend. IV; *accord Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

Under this Court's traditional Fourth Amendment analysis, Plaintiffs cannot prevail without satisfying a two-step analysis. At step one, they must

specify the accused conduct and demonstrate whether it was a "search" or a "seizure." This step is straightforward with respect to the claim of excessive force, which challenges the Deputies' firing shots upon seeing Mr. Mendez pointing a gun at them. At least with respect to Mr. Mendez, everyone agrees, that was a seizure—not a search—because apprehension of a person by the intentional "use of deadly force is a seizure." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Though questionable, we accept for purposes of argument that Mrs. Mendez was also seized when the Deputies inadvertently struck her with stray gunfire, without even knowing she was there. Pet. App. 69a.[2]

Once a seizure has been identified, the second step is to "[d]etermin[e] whether the force used to effect [that] particular seizure is 'reasonable'" at the time the force was applied. *Graham*, 490 U.S. at 396. The answer to this second question is indisputably "yes." Plaintiffs conceded—and the courts below found—that the Deputies applied reasonable force under the circumstances at the time that they dis-

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[2] *But see Brower v. Cty. of Inyo*, 489 U.S. 593, 596-97 (1989) ("[Seizure occurs] only when there is governmental termination of freedom of movement *through means intentionally applied*."); *accord Blair v. City of Dallas*, __ F. App'x __, No. 16-10202, 2016 WL 6775942, at *3 (5th Cir. Nov. 15, 2016) (collecting cases) ("[The] circuits have typically concluded that where the seizure is directed appropriately at the suspect but inadvertently injures an innocent person, the innocent victim's injury or death is not a seizure that implicates the Fourth Amendment because the means of the seizure were not deliberately applied to the victim." (quotation marks omitted)).

charged their weapons. Under this Court's established analysis, there is no basis for imposing § 1983 liability.

Graham v. Connor sets out the proper mode of analysis for whether a particular use of force was reasonable and therefore constitutional. 490 U.S. at 394-97. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. This objective reasonableness analysis "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotation marks omitted). Courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

"The 'reasonableness' of a particular use of force," this Court has emphasized, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" from "the peace of a judge's chambers." *Id.* Reasonableness must therefore be evaluated as of "the moment" the force was used. *Id.* This Court has likewise stressed that the "reasonableness" analysis must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *id.* at 396-97, and thus that officers' conduct can be reasonable in those instances even if "the officers may have made some mistakes," *Sheehan*, 135 S. Ct. at 1775 (quotation marks omitted). In other words, "[t]he proper perspective in judging an excessive force claim, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed." *Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring).

There is no dispute regarding the result of this Fourth Amendment reasonableness analysis. Both the district court and Court of Appeals held that the Deputies' use of force was objectively reasonable under the circumstances. *See* Pet. App. 22a ("[T]he district court held that the deputies' shooting of the Mendezes was not excessive force under *Graham v. Connor*."); Pet. App. 25a ("[T]he shooting itself was not unconstitutionally excessive force under the Fourth Amendment ...."). "Indeed, in their closing argument, counsel for Mr. and Mrs. Mendez conceded that (again, at the time Deputy Conley opened the shack door), Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives," Pet. App. 108a—even admitting that any contention that the Deputies' use of force was unreasonable at the time would itself be an "unreasonable argument to make." JA 230.

This Court has squarely held: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer

or to others, it is not constitutionally unreasonable to ... us[e] deadly force." *Garner*, 471 U.S. at 11 ("[I]f the suspect threatens the officer with a weapon ... deadly force may be used."); *accord Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (when a person "pose[s] a grave public safety risk, ... the police act[] reasonably in using deadly force to end that risk"); *Sheehan*, 135 S. Ct. at 1775 ("Nothing in the Fourth Amendment bar[s] [officers] from protecting themselves, even [if] it mean[s] firing multiple rounds.").

The district court found as fact that Mr. Mendez was pointing the BB gun "towards" the Deputies; the Deputies saw Mr. Mendez "holding the BB gun rifle"; they "*reasonably* believed that the BB gun rifle was a firearm rifle"; they "*reasonably* believed that ... Mr. Mendez[] holding the firearm rifle ... threatened their lives"; and the Deputies "fired their guns in the direction of Mr. Mendez, fearing that they would be shot and killed" otherwise. Pet. App. 69a. The district court found that, under the circumstances, the Deputies "did nothing wrong" in discharging their firearms. JA 237; *see Saucier v. Katz*, 533 U.S. 194, 205-06 (2001) (officers can act on "reasonable, but mistaken, beliefs ... and in those situations courts will not hold that they have violated the Constitution," including in the context of "using ... force"), *overturned in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). As the district court put it: "If the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." JA 237. That is the end of the matter.

Under the Fourth Amendment, "all that matters" is whether the officers' use of force was objectively "reasonable," *Scott v. Harris*, 550 U.S. 372, 383 (2007)—judged not in "hindsight" but rather "from the perspective of a reasonable officer on the scene," evaluated as of "the moment" the force was applied, *Graham*, 490 U.S. at 396. Everyone agrees that under this settled Fourth Amendment analysis, the force used to seize Plaintiffs was objectively reasonable at the time it was applied given the Deputies' reasonable belief that Mr. Mendez had a rifle pointed at them and that their lives were in imminent danger. *See* JA 179 (Deputy Conley) ("I thought to myself[:] This is where I'm going to die."); JA 217 (upon seeing the rifle barrel, Deputy Pederson thought, "whoever was in that shack ... [is] going to shoot us, and possibly kill one or both of us"). Imposition of § 1983 liability notwithstanding this acknowledged reasonable use of force is incongruous with the Fourth Amendment and is legally unsustainable.

II. The Provocation Rule Contravenes This Court's Fourth Amendment Jurisprudence, Undermines Crucial Qualified Immunity Protections, And Disregards Fundamental Tort Principles.

The Court of Appeals held that the Deputies' indisputably reasonable use of force to protect themselves from the perceived threat of death became unreasonable under a provocation rule that this Court has never condoned. This Court has observed that the provocation rule has been "sharply questioned," *Sheehan*, 135 S. Ct. at 1776 n.4 (collecting

cases), and the vast majority of the circuits reject it.[3] This Court should reject it as well.

We describe below the multiple problems with a rule that transmogrifies force that is objectively reasonable under the Fourth Amendment into force that is deemed objectively *un*reasonable under the Fourth Amendment. At the outset, however, it is important to note precisely what the provocation rule is—and is not.

The few circuits that recognize a provocation rule adopt different versions of it. In one version, courts may find an otherwise reasonable use of force to be unreasonable if "reckless or deliberate [officer] conduct during the seizure unreasonably created the need to use such force." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) (quotation marks omitted). Under this version, the provocative act need not even be a constitutional violation. *Id.* Thus, for example, the First Circuit found there could be provocation in an officer's decision to "le[ave] cover." *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005). Similarly, the Tenth Circuit found that officers may have provoked violence merely because they confronted the plaintiff "knowing that he was armed and distraught

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[3] *See* Pet. 14-21 (collecting cases); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Rockwell v. Brown*, 664 F.3d 985, 992-93 (5th Cir. 2011); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007); *Schulz v. Long*, 44 F.3d 643, 647-48 (8th Cir. 1995); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994); *cf. Smith v. LePage*, 834 F.3d 1285, 1298 (11th Cir. 2016); *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994).

over problems he was having with his girlfriend." *Sevier v. City of Lawrence*, 60 F.3d 695, 701 n.10 (10th Cir. 1995); *see Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997) (recognizing that a lawful act, such as running towards the plaintiff's car screaming, can be a provocation). The Ninth Circuit, for its part, has held that an officer can be liable for his otherwise reasonable use of force because *another officer* acted provocatively. Pet. App. 122a (discussing *Glenn v. Washington Cty.*, 673 F.3d 864, 869, 878-79 (9th Cir. 2011)).

In this case, the Ninth Circuit articulated the rule as follows: "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). But even while reciting that rule, that is not the rule the Court of Appeals followed here.

For one thing, the Court of Appeals held that the provocation rule—curiously enough—does not require actual provocation. Pet. App. 22a-23a. As the district court accurately reported, "the Ninth Circuit has indicated that the predicate constitutional violation (here, illegal entry) need not be menacing or 'provocative' in the sense of inciting a violent response." Pet. App. 118a. The provocation rule simply "require[s] that the deputies' unconstitutional conduct '*created a situation which led to the shooting* and required the officers to use force that might have otherwise been reasonable." Pet. App. 22a (emphasis added) (quoting *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010)).

Moreover, the Ninth Circuit's provocation rule does not require a showing that the police conduct actually provoked a violent reaction. As the court explained: "Our case law does not indicate that liability may attach only if the plaintiff acts violently." *Id.* Thus, the court applied the rule here even though the Deputies' conduct did not provoke anyone to "act[] violently"; Mr. Mendez was merely shifting his BB gun in response to what he thought was a joke. Pet. App. 68a. The Court of Appeals found it enough that, through a tragic coincidence, Mr. Mendez's weapon happened to be in a menacing pose when the police pulled back the curtain. Pet. App. 23a.

Taken together, then, the provocation rule holds officers liable for their reasonable use of defensive force to protect themselves and others from the imminent prospect of bodily injury or death *if* some officer first committed an act that provoked no violent response but simply ended in a situation where the officers had to use force. "[W]e simply require that the deputies' unconstitutional conduct created a situation which led to the shooting." Pet. App. 22a (quotation marks omitted).

Neither the rule the Court of Appeals articulated nor the rule it applied can be sustained. No matter the formulation, the provocation rule holds officers liable for the otherwise reasonable use of force if there has been some other infraction along the way to the subsequent use of force. Such a theory of liability is fundamentally at odds with bedrock principles. It attaches liability for *reasonable* uses of force, in violation of *Graham* (§ II.A). It improperly erodes the venerable defense of qualified immunity (§ II.B.). And it

creates potentially open-ended liability for law enforcement officers under § 1983, in derogation of governing tort precepts of proximate cause (§ II.C). The provocation rule is untenable, and this Court should reject it.

A. The provocation rule contravenes this Court's settled Fourth Amendment jurisprudence.

The provocation rule "render[s] ... 'otherwise *reasonable* defensive uses of force *unreasonable* as a matter of law.'" Pet. App. 121a (emphasis added) (quoting *Billington*, 292 F.3d at 1190-91). This incongruous rule is at odds with this Court's Fourth Amendment jurisprudence, which is rooted in the critical need to allow officers to make split-second judgments in life-or-death circumstances.

1. Most basically, the provocation rule is contrary to the Fourth Amendment because it declares that the use of force violates the Fourth Amendment even when the force was reasonable under—and therefore in compliance with—the Fourth Amendment. As this Court has explained, an officer is constitutionally permitted to—indeed, is expected to—use "deadly force" when he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. Yet under the provocation rule, an officer is forbidden to use any force—much less deadly force—even when confronted with the risk of or death to himself, his fellow officers, or innocent civilians.

The Court of Appeals did not discuss *Garner* or *Graham*. Pet. App. 22a-24a. That is because a provocation finding trumps the inquiry set out in this Court's authoritative excessive-force cases. But there simply is no escaping that a rule that holds a reasonable use of force unreasonable because of some separate action by the officer "is plainly at odds with language in *Garner* [and, later, in *Graham*] emphasizing that the use of deadly force in effecting an arrest is constitutional when the officer has probable cause to believe that the suspect poses a threat to the officer." *Sampson v. Gilmere*, 476 U.S. 1124, 1125 (1986) (Burger, C.J., and O'Connor, J., dissenting from the denial of certiorari) (cited by *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996), in rejecting the provocation rule).

2. The provocation rule overlooks that a significant component of the Fourth Amendment reasonableness analysis is the "temporal perspective of the inquiry." *Saucier*, 533 U.S. at 206. An unbroken line of cases applying *Graham* assesses whether the officer's use of force is reasonable as of "the moment" the force was applied. *Graham*, 490 U.S. at 396; *accord Plumhoff*, 134 S. Ct. at 2022 (considering the threat posed "at the moment when the shots were fired"); *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring) ("The proper perspective in judging an excessive force claim, *Graham* explained, is that of 'a reasonable officer on the scene' and 'at the moment' force was employed." (quoting *Graham*, 490 U.S. at 396)); *Saucier*, 533 U.S. at 206 (collecting Fourth Amendment search and seizure cases looking at the officer's knowledge "at the moment" of the search or arrest).

This Court's repeated reference to that "moment" is not sloppy language. It is fundamental to how the Fourth Amendment operates. A seizure occurs the moment an officer "appl[ies] ... physical force to restrain movement." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). It is therefore only that action—applying "force ... to effect a particular seizure"—that a court evaluates to determine whether the seizure is "reasonable." *Graham*, 490 U.S. at 396.

This Court's post-*Graham* Fourth Amendment excessive-force cases illustrate that the officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure. In each of those cases, the reasonableness analysis focused on the circumstances "at the moment" of the seizure—i.e., at the moment the force was applied.

Scott v. Harris, for example, involved a car chase that lasted six minutes over nearly 10 miles. 550 U.S. 372, 375 (2007). But it was only the final step—"terminat[ing] the car chase by ramming [the officer's] bumper into respondent's vehicle"—that "constituted a seizure." *Id.* at 381. Thus, it was only that action, the "manner in which [the] seizure was effected," that the Court evaluated for reasonableness. *Id.* at 383; *accord id.* at 374 (stating the issue was whether "ramming the motorist's car from behind" was constitutional); *id.* at 386 (concluding that the officer's "attempt to *terminate* the chase *forcing respondent off the road* was reasonable" (emphasis added)). The Court did not consider the reasonableness of the officer's conduct in initiating the chase. Nor did it evaluate his conduct during the entire six-minute chase.

Neither the initial approach nor the high-speed pursuit was the seizure—and thus the reasonableness of that conduct was not at issue under the Fourth Amendment.

This Court made the point explicit in *Plumhoff v. Rickard*, where it rejected a provocation rule of sorts. That case, too, involved a high-speed car chase, lasting over five minutes. 134 S. Ct. at 2021. After several unsuccessful attempts to end the chase, the officers finally were able to momentarily stop the car they were chasing. *Id.* at 2017. Thereafter, as two officers approached the car on foot, the driver put his car in reverse and attempted to escape, crashing into another police cruiser. *Id.* In the ensuing 10 seconds, the officers fired 15 shots, leading the driver to crash the car. *Id.* at 2018. In the resulting § 1983 litigation, this Court evaluated only whether the officers' actions in those final 10 seconds were reasonable, concluding that, "*at the moment* when the shots were fired," the officers acted reasonably. *Id.* at 2022 (emphasis added); *accord id.* at 2024 (holding reasonable "the deadly force that they employed *to terminate* the dangerous car chase" (emphasis added)).

In so ruling, the Court explicitly rejected the argument that it should evaluate whether the officers' conduct leading up to the chase, or their conduct throughout the chase, was reasonable. The district court there had relied on a provocation argument, insisting that the officers were not justified in using deadly force because "th[e] danger was caused by the officers' decision to continue the chase." *Id.* at 2021 n.3. In assessing the danger the driver posed to the public, the district court refused to consider the

driver's attempt to exit the interstate quickly, his swerving at high speeds, and even his disregard for the safety of others because, in the court's view, those "were caused by the [officers'] pursuit." *Estate of Allen v. City of W. Memphis*, No. 05-2489, 2011 WL 197426, at *8 (W.D. Tenn. Jan. 20, 2011). This Court held that this line of argument was improper, focusing instead on the moment of the shooting.

Brower v. County of Inyo involved yet another car chase, this one extending over 20 miles and ending when the fleeing car crashed into a police roadblock. 489 U.S. at 594. The question was whether the suspect had been seized, and the Court concluded that he had. *Id.* at 599. The Court then remanded for the reasonableness determination. Its direction was to determine whether "the roadblock" at the end of the chase that caused "[the] seizure ... was 'unreasonable,'" *id.* at 599-600, not whether the officers' conduct leading up to the chase, or throughout the chase, was reasonable. Consistent with this Court's precedent, the focus had to be on the act of seizure, not the preceding events. *Id.*; *accord Hodari D.*, 499 U.S. at 628 ("We did not even consider [in *Brower*] the possibility that a seizure could have occurred during the course of the chase because, as we explained, that 'show of authority' did not produce his stop.").

That limitation, too, was not loose language. The plaintiffs' argument to this Court revolved largely around the proposition that the "pursuit," in addition to the roadblock, was unreasonable. Brief for Petitioners at i, 7-14, 26-33, *Brower*, 489 U.S. 593 (No. 87-248), 1988 WL 1025841. The plaintiffs contended that the officers "were [e]nsuring a high speed chase by

continuing the pursuit," and that they "should not now be permitted to justify the use of deadly force to protect against a danger they themselves created." *Id.* at 30-31. If this Court had thought that this sort of provocation was appropriately part of the reasonableness analysis, it would not have limited the reasonableness inquiry to the final moment of the ultimate seizure.

Consistent with these decisions and the Court's focus on "the moment" the force was applied, the district court here expressly found for the Deputies on what it styled as the "excessive force claim (based on conduct at the moment of the shooting)." Pet. App. 135a; *see* Pet. App. 106a-08a; *see also* Pet. App. 22a-25a (Court of Appeals holds the Deputies' force unreasonable even though "the shooting itself was not unconstitutionally excessive force under the Fourth Amendment"). But, critically, the district court then "mov[ed] back from the moment of shooting," JA 238, to consider the use of force in light of the earlier unannounced warrantless entry of the shack. On that basis, the court imposed liability on, as the court put it, the "excessive force claim (based on *Alexander/Billington* provocation)." Pet. App. 135a. That approach is directly contrary to the temporal dictates of *Graham* and this whole line of cases.

3. This Court's repeated emphasis on the "moment" of the seizure in its excessive-force cases serves an important practical purpose, which the provocation rule squanders. The "reasonableness" inquiry under the Fourth Amendment is designed to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. When an officer's life is on the line—or when he is protecting others—we want him to make the right decision for that moment, without fear that judges or juries will engage in "armchair quarterbacking" of his every move with "the benefits of hindsight." *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996).

Take this case: A deputy searching for a suspect believed to be armed and dangerous pushes aside a curtain to reveal the silhouette of a man with a rifle aimed dead at him at point-blank range. At that crucial moment when it strikes him, "This is where I'm going to die," JA 179, what do we him to do? The Fourth Amendment cases say we want the deputy to behave reasonably at that moment, based on what he knows then and there. Some would say that the only reasonable decision is to fire. But even if one might advocate some other course of conduct, and believe "the officers may have made some mistakes," the Fourth Amendment leaves officers room to make reasonable judgments. *Sheehan*, 135 S. Ct. at 1775 (quotation marks omitted); *see Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (noting that "[r]econsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred").

The provocation rule, however, makes no such allowance for split-second judgments and affords no such leeway for what judges and advocates may later characterize as mistakes when examining the matter in the serenity of their chambers and offices with the benefit of hindsight. The practical consequence is that

an officer is no longer free to make the best judgment for that moment in time. In that split second while seeing a silhouetted figure with a rifle pointing his way, the provocation rule directs the officer *not* to take the action that is most advisable then and there. The provocation rule requires him to pause and replay the day's events in search of an earlier decision that a judge might later deem a provocation—to conduct in a split second the constitutional analysis that the district court took 45 pages and 16 weeks to complete.

If the very hesitation is not deadly, the ultimate decision will be. A ruling that the shooting was unreasonable because of the earlier violation means that the Deputies were legally obligated not to shoot. Imagine that the person at the end of that gun had been a fugitive (such as O'Dell) willing to kill to avoid capture. The result could be two dead Sheriff's Deputies.

Then-Judge Alito offered a spine-tingling illustration:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him.

Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995). The court asked whether "the third officer necessarily [would be] liable for the harm caused to the suspect?" *Id.* "The obvious answer is 'no.'" *Id.*

Under the provocation rule, however, the law would prohibit the third officer from using force, much less shooting. It would certainly prohibit him if the failure to knock and announce was what precipitated the suspect's violent response. The officer would also be forbidden to use force if the officers did knock and announce and the only constitutional violation was that the warrant did not incorporate the necessary attachments, which is a clearly established Fourth Amendment violation. *Groh v. Ramirez*, 540 U.S. 551, 563 (2004). A rule that prohibits an officer—under any of these circumstances—from firing on a cop-killer in the officer's own defense makes no sense and is incompatible with this Court's excessive-force framework and with the important practical considerations it embodies.

B. The provocation rule undermines qualified immunity.

The whole dynamic the provocation rule creates—holding officers liable for reasonable use of force, forcing them to hesitate and reassess all their conduct while making split-second life-or-death decisions, and, worse, compelling them to make the wrong decision on threat of crushing liability—is inconsistent with critical qualified immunity protections.

The whole point of qualified immunity is to "shield [officers] from undue interference with their

duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Law enforcement officers are thus entitled to qualified immunity if their conduct does not violate "clearly established" law. *Id.* at 818. This protection eliminates "the danger that fear of being sued will dampen the ardor of all but the most resolute ... public officials, in the unflinching discharge of their duties." *Id.* at 814 (quotation marks and brackets omitted). The immunity "gives government officials breathing room to make reasonable but mistaken judgments." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

These principles are "especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Saucier*, 533 U.S. at 205); *see White v. Pauly*, 580 U.S. __, No. 16-67 (Jan. 9, 2017) (per curiam). Particularly here, the qualified-immunity protection is important "to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3 (quoting *Harlow*, 457 U.S. at 814). We need officers to protect themselves—and protect us—when confronted with the threat of deadly force. We need them to do their best to apply the degree of force called for under the circumstances, *see Graham*, 490 U.S. at 396 (identifying factors to consider in determining whether the force applied was reasonable), not to treat the entire encounter like a law school issue-spotting exam.

The very nature of the provocation rule undermines qualified immunity principles, but the Ninth Circuit's version of the rule negates the protection outright. Under that rule, a court imposes liability merely because there was "an independent Fourth Amendment violation." Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). Notably, the rule does not say the predicate constitutional infraction must be a "violation of clearly established Fourth Amendment law." A court can conduct its entire provocation analysis—and hold an officer individually liable for crushing monetary damages—without ever asking whether the violation in question was a violation of clearly established law.

This is no abstract concern. Although the Court of Appeals' analysis is opaque at points—particularly with regard to the relationship between the provocation rule and its causation analysis—the court ultimately imposed liability here based largely on the Deputies' *legally immunized* conduct: the Deputies' failure to separately knock and announce at the shack. The court faulted the "officers [for] barg[ing] into the shack *unannounced*." Pet. App. 25a (emphasis added). "Had this [knock-and-announce] procedure been followed," the court observed, "the Mendezes would not have been shot." Pet. App. 22a. That lapse was what the court viewed as causing Plaintiffs' injuries. But the Court of Appeals had already correctly concluded that the Deputies were legally entitled to qualified immunity on the knock-and-

announce claim because they violated no clearly established law. Pet. App. 18a-20a.[4]

The reliance on this immunized conduct is in no way mitigated by the Court of Appeals' conclusion that Deputy Conley violated a *different* right that was clearly established—by failing to secure a warrant. Pet. App. 8a-18a. If that had sufficed to establish the requisite provocation, there would have been no need to emphasize the knock-and-announce lapse, as the Court of Appeals repeatedly did. The court emphasized knock-and-announce because (for reasons explained below, at 48-51) the failure to secure a warrant could not qualify as sufficient provocation under any rational understanding of a provocation rule or basic tort principles.

What then of the portion of the Ninth Circuit's rule that asks whether the "officer intentionally or recklessly provoke[d] a violent confrontation"? Pet. App. 22a (quoting *Billington*, 292 F.3d at 1189). The Ninth Circuit suggested this phrase ensured the officers were held liable only for conduct that was a violation of clearly established law. *See* Pet. App. 23a-24a. But we know that is not the case, since the Court of Appeals counted against the Deputies conduct that

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[4] We are not seeking to raise here the question in the petition on which the Court denied certiorari—i.e., whether the Deputies are entitled to qualified immunity because it was not clearly established that a provocation need not provoke a violent act from the plaintiff. The point here is a more general one that the provocation rule inherently and improperly undercuts qualified immunity as a categorical matter, not that the Deputies in this case were specifically entitled to qualified immunity on Plaintiffs' provocation-rule claim.

was legally immune—i.e., the knock-and-announce violation. Nor did the Court of Appeals suggest that any provocation here was "intentional" or "reckless" in any colloquial sense. The Deputies did not intend to inflame or arouse anyone, but merely opted not to get a warrant before opening a door to a backyard shack that (as the district court found) they did not believe was a residence. Whatever the meaning of the Court of Appeals' opaque reference to "intentional" or "reckless" constitutional violations, the court's rule does nothing to undo the harm to fundamental principles of qualified immunity wrought by the provocation rule.

C. The provocation rule overrides basic tort principles of proximate cause.

Section 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), and therefore incorporates proximate cause, a "standard aspect of ... the law of torts," *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014); *see Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("Of course, constitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation."); *Bodine*, 72 F.3d at 400 (Alito, J.) (officers can be liable only "for the harm 'proximately' or 'legally' caused by their tortious conduct (i.e., by their illegal entry)" (citing Restatement (Second) of Torts §§ 431 & 871 cmt. 1)); *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998) (similar). "[N]ot every injury in which a state official has played some part is actionable under [§ 1983]." *Martinez v. California*, 444 U.S. 277, 285 (1980). Any liability rule must require, at a minimum, that the constitutional

violation proximately cause the injuries complained of.

The "requirement of proximate cause is more restrictive than a requirement of factual ['but-for'] cause alone." *Paroline*, 134 S. Ct. at 1720. "Every event has many"—if not infinite—"[factual] causes, ... only some of [which] are proximate [causes]." *Id.* at 1719; *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) ("'[P]roximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.").

The Court of Appeals' provocation rule is invalid because it does not require proximate cause. Here, again, is the rule the court recited: "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." Pet. App. 22a (quotation marks and brackets omitted). This formulation does not mention proximate cause (or causation at all). And we know that the word "provokes" does not fill the gap, because, as discussed above (at 26-27), "provokes" in this context does not even mean "provokes"; it means "simply ... created a situation which led to the shooting." *Id.* (quotation marks omitted). That is nothing but factual causation. The Court of Appeals confirmed as much by writing a *separate* alternate holding based on proximate cause, Pet. App. 24a-25a, which, for reasons discussed below (at 44-47), also bore no resemblance to standard proximate cause analysis. If the court had already required and

found proximate cause, there would have been no reason to try thereafter to demonstrate proximate cause and the consequences of such a finding.

Because the Ninth Circuit's provocation rule has no proximate cause requirement, plaintiffs will almost always be able to meet the low bar of but-for causation:

> Other than random attacks, all [excessive-force] cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Plakas, 19 F.3d at 1150. Officers will thus face potential liability for everything that happens after a predicate constitutional violation. This Court has never approved of such sweeping and open-ended liability for constitutional torts—and should not do so now.

III. The Deputies' Decision To Enter The Shack Without A Warrant Did Not Proximately Cause The Injuries Inflicted When They Reasonably Responded To A Gun Pointed At Them.

The Court of Appeals hedged its bet on the provocation rule by adding that "even without relying on

our circuit's provocation theory," it would hold the Deputies "liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Thus, the Court of Appeals held the Deputies "liable" for Plaintiffs' injuries "for the shooting ... even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment." Pet. App. 25a.

This analysis is wrong as a matter of law. The decision not to secure a warrant before opening the door to the shack—the only violation for which the Deputies were not immune—was not a proximate cause of Plaintiffs' injuries (§ III.A). And, independently, Mr. Mendez's own act of pointing the gun at the Deputies was a superseding cause that severed any causal nexus between the decision to enter without a warrant and the later use of force (§ III.B).

A. Injuries resulting from the subsequent use of objectively reasonable force are not within the scope of the risk of the failure to secure a warrant.

1. Plaintiffs could not establish proximate cause unless they proved a "direct relation between the injury asserted and the injurious conduct alleged"—not simply a causal relationship, "but one with a sufficient connection to the result." *Paroline*, 134 S. Ct. at 1719; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (proximate cause requires "a sufficiently close connection" between "the harm alleged" and the tortious "conduct"). To determine whether there is a sufficient connection, this Court has adopted the tort-law principle that

proximate cause requires proof that the injuries complained of were within "the scope of the risk created by the predicate [tortious] conduct." *Paroline*, 134 S. Ct. at 1719. The tort rule is that the defendant can "be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 29, cmt. d. The scope of the risk is measured by "the reasons for holding the actor liable in the first place." *Id.*

Applying this principle in the § 1983 context, this Court has held that a plaintiff can recover only such damages as are "tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). An injury that does not reflect the interests that the pertinent constitutional right was designed to protect is "too remote a consequence of ... officers' actions," and is not compensable under § 1983. *Martinez*, 444 U.S. at 285. Thus, Plaintiffs had to prove that "the scope of the risk created by" the violation included that they would be shot by the police in reasonable self-defense. *Paroline*, 134 S. Ct. at 1719.

Plaintiffs' only actionable constitutional claim was the failure to secure a warrant prior to searching the shack. The purpose of the search warrant requirement generally is "to protect privacy interests" by (1) ensuring that the search is justified by probable cause and is not just "the random or arbitrary act[] of government agents"; (2) "provid[ing] the detached scrutiny of a neutral magistrate, and thus ensur[ing] an objective determination whether an intrusion is

justified in any given case"; and (3) "assur[ing] the citizen that the intrusion is ... narrowly limited in its objectives and scope." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 622 (1989); *accord Steagald v. United States*, 451 U.S. 204, 213 (1981) (purpose of search warrant approved by neutral magistrate judge is to "safeguard[] an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police").

But here, a warrant would have served only the second purpose ("the detached scrutiny of a neutral magistrate"). The first purpose is not implicated, because the district court found that the Deputies "had probable cause to search ... the shack." Pet. App. 93a. And the third purpose (limiting the scope) is not implicated because the Deputies approached in broad daylight and merely opened the door to see if O'Dell was hiding inside.

Where a search is unreasonable because the officers lacked probable cause (the first purpose) or exceeded the permissible scope (the third purpose), the sorts of damages a plaintiff can recover relate to the harms one might suffer from the resulting invasion of privacy—for example, "humiliation, embarrassment, and mental suffering." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-90 (1971); *see Sims v. Mulcahy*, 902 F.2d 524, 532 (7th Cir. 1990) (discussing plaintiff's claims of "pain, suffering and mental anguish" resulting from feeling "violated and humiliated" by a warrantless entry). But where the only violation was the failure to have a judge find probable cause in advance rather than confirming it after the fact, as happened here,

damages are often unavailable because no concrete injury exists. *See, e.g.*, *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992).

A search warrant is not, however, directed at preventing physical injuries. One would not ordinarily say, "You better get a search warrant, or else people will get hurt." Certainly, obtaining independent verification of probable cause from a judicial officer has nothing to do with avoiding violence during a search. And because the purpose of the warrant requirement is not limiting the force directed at individuals, much less at protecting against physical injury, injuries from an officer shooting during a search are not within the scope of the risk in failing to obtain magistrate approval for a search warrant. In that situation, injuries from an officer's discharge of a firearm are simply beyond "the reasons for holding [officers] liable [on a warrantless-entry claim] in the first place." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, cmt. d.

There is no way to stretch the constitutional violation that was found here to embrace the risk of the sort of injury for which Plaintiffs seek compensation. *Cf. Miller v. Albright*, 657 F.3d 733, 738 (8th Cir. 2011) (holding that plaintiff's claims for warrantless entry and excessive force "are separate and distinct" and the "damages resulting from the excessive force claim are not sufficient to show that [plaintiff] suffered damages as a result of the officers' unlawful entry into his home"). When an officer inflicts a physical injury on an individual, the constitutionally cognizable claim for that injury is ordinarily not a claim of unreasonable search—and certainly not a claim of

failure to get a warrant—but rather a claim of unreasonable seizure. *See Brower*, 489 U.S. at 599 (observing that a plaintiff could recover damages from an unreasonable seizure that was set up "in such manner as to be likely to kill").

That is why the district court awarded only nominal damages for the Deputies' failure to secure a warrant—an acknowledgment that the violation did not proximately cause Plaintiffs' physical injuries and thus the warrantless-entry claim "in and of itself [is] only worth a dollar in nominal damages." JA 238. As this Court has explained, nominal damages are appropriate where constitutional deprivations "are not shown to have caused actual injury." *Carey*, 435 U.S. at 266. Any injury that ended up occurring during the search—and especially the injury that occurred because of the Deputies' concededly *reasonable* use of force—is unfortunate, even tragic. But, as the district court understood, it is not compensable as part of the damage caused by the violation of the warrant requirement.

This is exactly how the scope-of-risk analysis works under tort law. Under basic tort principles, an act that may be wrong for some reason does not create liability for every injury that results; the plaintiff has to prove a connection between the duty breached and the injury. Take this illustration from the Restatement:

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands

> his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, illus. 3. Similarly, here, the risk from the constitutional violation (the failure to secure a warrant before opening the shack's door) bears no relation to the injury that, through sheer fluke, came to pass when the Deputies reasonably defended themselves against a person pointing a gun at them.

2. The Court of Appeals at no point identified the risks the warrant requirement protects against. Rather, the court skipped that critical step and merely held that it was "reasonably foreseeable" that Mr. "Mendez [would be] holding a gun when the officers *barged* into the shack *unannounced*." Pet. App. 25a (emphasis added). And it noted that a "*startling* entry into a bedroom will result in tragedy." Pet. App. 24a-25a (emphasis added). This was in keeping with the view the Court of Appeals expressed a couple of pages earlier as to what caused the injury: "Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez

was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." Pet. App. 21a-22a.

Here, again, the Court of Appeals was impermissibly leveraging immune conduct—the failure to knock and announce—into liability for a separate constitutional violation. The sole constitutional violation on which liability can be based had nothing to do with "barg[ing]," "startling," or announcing. It had to do with the failure to obtain a warrant indicating a magistrate's approval before opening a shack door. Since that piece of paper—as important as it is—is not designed to prevent bodily injury, it is simply not foreseeable that the failure to secure a warrant to look inside a shack would lead the shack's occupant to draw a gun as uniformed officers draw the curtain in broad daylight.

The distinction between the two violations the Court of Appeals conflated is crucial, for the purpose of the knock-and-announce requirement—unlike the warrant requirement—*is* to protect "human life and limb." *Hudson v. Michigan*, 547 U.S. 586, 593-94 (2006). The premise of knock-and-announce is that "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* at 594. Knocking and announcing, when required, also affords individuals "the opportunity to comply with the law" when the police announce their presence and an intention to enter, and thus "gives residents the opportunity to prepare themselves for the entry of the police." *Id.* (quotation marks omitted). Thus, while the failure to knock and announce bears at least some relationship to the injury that resulted, the presence or

absence of a warrant was not even a cause—much less a proximate cause—of Plaintiffs' injuries from the Deputies' reasonable use of force.

The only other authority the Court of Appeals invoked was off base for similar reasons. The court quoted Justice Jackson's condemnation of a particular law enforcement "method ... [that] not only violates [the] legal rights of defendant but is certain to involve the police in grave troubles if continued." Pet. App. 25a (quoting *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring)). The police tactic was an officer "in plain clothes, prying up [a] bedroom window and climbing in." *McDonald*, 335 at 460-61 (Jackson, J., concurring). "When a woman sees a strange man, in plain clothes," *id.* at 460, "breaking and entering" like a common burglar, *id.* at 459, Justice Jackson warned, "her natural impulse would be to shoot," *id.* at 461. What the officer did there was a knock-and-announce violation on steroids—as this Court has since recognized, *see Hudson*, 547 U.S. at 594. Justice Jackson was not suggesting that uniformed police officers, like the Deputies here, JA 98-99, 108-09, should expect to be shot upon entering a backyard shack in the middle of the day—or upon executing any other sort of search.

The Court of Appeals' own logic about what caused the injuries here confirms that the violation of the warrant requirement was not the cause. The court concluded that "the Mendezes would not have been shot" had the "[knock-and-announce] procedure been followed." Pet. App. 22a. The same cannot be said of failing to get a warrant. Even if the Deputies had a warrant in their back pockets when they opened the

shack door without announcing their presence, the outcome would have been the same: Mr. Mendez would still have thought it was Ms. Hughes at the door and would have picked up his gun to move it while sitting up in bed. Deputy Conley would still have seen the gun pointing at him, and the Deputies would still have fired shots in reasonable self-defense. *See* Pet. App. 68a-69a. Same if the Deputies had established an exception to the warrant requirement—e.g., by validly securing Ms. Hughes's consent to search the shack or permissibly entering the shack in hot pursuit.

B. In any event, Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of the injuries.

Even if Plaintiffs' injuries were within the scope of risk of the warrant requirement, they still could not establish proximate cause because Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries, and therefore cut off any possibility of liability for the shooting.

Superseding cause is one of the proximate cause precepts that prevents "infinite liability," D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984), by ensuring that "not all [causes] should give rise to legal liability," *CSX Transp.*, 564 U.S. at 692. The superseding cause doctrine instructs that an "independent act [that] is also a factual cause of harm" separates an official's misconduct from the injury. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34; *see Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837

(1996). Where the intervening act is "sufficient to sever the causal nexus" between the official misconduct and the injury, it "cut[s] off all liability." *Archer v. Warner*, 538 U.S. 314, 326 (2003) (Thomas, J., dissenting); *see Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (discovery of outstanding arrest warrant broke the causal link between an unconstitutional stop and the discovery of incriminating evidence).

This Court in *Brower* illustrated how a superseding cause interacts with a claim of unreasonable seizure. There, the Court considered what would have happened if the plaintiff in a high-speed car chase "had the opportunity to stop voluntarily at [a police] roadblock" but "negligently or intentionally [drove] into it" instead. 489 U.S. at 599. The Court explained that the plaintiff's driving into the roadblock would be a superseding act cutting off "proximate causality." *Id.*

This fundamental tort principle of "a superseding cause, as traditionally understood in common law tort doctrine, will relieve a [§ 1983] defendant of liability." *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1071 (2d Cir. 1997) (collecting cases). Under this principle, numerous cases have held that when an individual acts in a manner that law enforcement officers reasonably perceive as a threat, that conduct is a superseding event that can break the chain of causation from prior unlawful conduct. *See, e.g.*, *Lamont v. New Jersey*, 637 F.3d 177, 185-86 (3d Cir. 2011); *Hundley v. District of Columbia*, 494 F.3d 1097, 1104-05 (D.C. Cir. 2007); *Kane v. Lewis*, 604 F. App'x 229, 234-35 (4th Cir. 2015); *James v. Chavez*, 511 F. App'x 742, 747-51 (10th Cir. 2013); *Estate of Sowards v. City of*

Trenton, 125 F. App'x 31, 42 (6th Cir. 2005); *see also Cameron v. City of Pontiac*, 813 F.2d 782, 786 (6th Cir. 1987).

Then-Judge Alito addressed the superseding-cause rubric in a similar situation in *Bodine*. The plaintiff there brought a § 1983 claim alleging that officers illegally entered his home without first knocking and announcing their presence and then used excessive force to effectuate his arrest. 72 F.3d at 393. The district court ruled that the plaintiff was entitled to judgment on the illegal entry claim, and then instructed the jury that it need not determine whether the officers used excessive force because their unlawful entry by itself rendered any use of force unreasonable. *Id.* at 393-94.

The Third Circuit reversed, admonishing that, even if the initial entry had been illegal, the officers were not liable "for harm produced by a 'superseding cause.'" *Id.* at 400. Without deciding the question, the court strongly suggested that, if the officers' use of force to arrest the plaintiff was "reasonable," this "non-tortious" act would break any chain of causation between the illegal entry and the injuries arising from the subsequent use of force. *Id.* The court explained that "the suspect's conduct [in creating the need for reasonable force] would constitute a 'superseding' cause, *see* Restatement (Second) Torts § 442 (1965), that would limit the officer's liability." *Id.* The court made that assessment even though, unlike here, the knock-and-announce violation was a possible basis for liability.

The D.C. Circuit came to a similar conclusion in *Hundley*. There, an off-duty officer drew his gun and ordered the driver and passenger out of a car after the car had attempted to run the officer over. 494 F.3d at 1099-100. After the driver exited the car, he made a threatening movement towards the officer, who in response shot and killed him. *Id.* The court held that, even if the officer had acted unreasonably in initially ordering the driver and passenger out of the car, the suspect's ensuing conduct was a superseding cause breaking the chain of causation between the initial stop and the subsequent shooting. *Id.* at 1104-05 & n.5; *accord Lamont*, 637 F.3d at 185-86 (applying *Bodine* and *Hundley* to conclude no proximate cause existed where plaintiff's quick hand movements—though he was not actually holding a weapon—broke the chain of causation).

Under these principles, Mr. Mendez's own conduct—picking up a gun and pointing it at the Deputies—broke any chain of proximate causation. When an officer confronting that situation reasonably thinks, "This is where I'm going to die," JA 179, he should not and cannot be held liable for the resulting injuries—at least where, as here, the officer has no reason to expect that his conduct would lead a law-abiding occupant, knowing he was an officer, to respond with a gun. A "[h]olding otherwise would, as noted in *Hundley*, tend to deter police officers" from carrying out their duties or protecting themselves and others in self-defense. *Lamont*, 637 F.3d at 186.

Courts have, at times, defined a superseding event as an unforeseeable event. *See, e.g.*, *Exxon*, 517 U.S. at 837 (quoting 1 T. Schoenbaum, Admiralty and

Mar. Law § 5-3, pp. 165-166 (2d ed. 1994)). To the extent this notion applies, it is satisfied here. Resisting or threatening a uniformed police officer who does nothing to incite a violent response is not only unforeseeable, it is tortious and even criminal. "[I]t is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer, thereby triggering a situation that requires the officer to use deadly force in self-defense." *Hundley*, 494 F.3d at 1104-05; *see Duran v. City of Maywood*, 221 F.3d 1127, 1131 (9th Cir. 2000) ("[O]fficers simply walk[ing] up a driveway silently with their guns drawn" should not "have provoked an armed response."); *James*, 511 F. App'x. at 747 (homeowner has no right to use force to "resist[]"even "an unlawful arrest or entry into his home, simply because of its unlawfulness").

Indeed, many criminal codes, including the California Penal Code, *prohibit* an individual from forcibly resisting arrest by a peace officer, even if the arrest itself is unlawful. *See* Cal. Penal Code § 834a; Model Penal Code § 3.04(2)(a)(i) ("The use of force is not justifiable ... to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful."). "[A] person usually has no reason to foresee the criminal acts of another." *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981). Thus, when the Deputies saw Mr. Mendez pointing a gun at them at point blank range—and reasonably interpreted that as a criminal act—Mr. Mendez's act "br[oke] the chain of causation," severing any "proximate cause" from the Deputies' warrantless entry and Plaintiffs' "injury resulting from the intervening criminal act." *Id.* at 993-94; *see also, e.g., Gaines-Tabb v.*

ICI Explosives, USA, Inc., 160 F.3d 613, 620 (10th Cir. 1998).

For all these reasons, Mr. Mendez's act of pointing a gun at uniformed Deputies was a superseding event that broke the chain of causation. The Deputies therefore cannot be held liable for the ensuing harm when they applied reasonable force in response.

It was a tragic happenstance.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Date: January 17, 2017

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FILED
FEB 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CHRISTOPHER CONLEY AND JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does the legal framework set out in *Graham v. Connor*, 490 U.S. 386 (1989), apply to actions by police that foreseeably create a need for the use of force?

2. In an action under 42 U.S.C. § 1983, where a house search that violates the Fourth Amendment results in the shooting of an innocent resident who did not know that the intruders were sheriff's deputies, does a resident's nonculpable response to the intrusion constitute a superseding cause that bars relief for the residents' injuries?

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INTRODUCTION

This appeal concerns a complex and deeply troubling line of cases. In many situations in which police are called upon to use lethal force, the victim was at fault, having created the need for such force by shooting at officers, refusing to put down a weapon, or other highly culpable conduct. But there have been repeated instances in which the police, not the victim, created the need (or more often merely the apparent need) for force, resulting in death or grave injury to an entirely blameless, law-abiding individual. In some instances, as here, police did so by committing a constitutional violation that foreseeably led to the apparent (but mistaken) need for the use of force. This problem arises most often when police fail to identify themselves as law enforcement officers. In some of those cases, the unidentified officers have entered private homes and startled innocent residents—with tragic consequences.

That is precisely what happened here. Both courts below found that Petitioners' conduct was unconstitutional and violated clearly established law, and those determinations are now judicially final. In contrast, Petitioners recognized below and the district court found that Mr. and Mrs. Mendez[1] did nothing wrong. Yet as a direct result of

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[1] Consistent with the district court decision, this brief refers to Respondent Jennifer Lynn Garcia as "Mrs. Mendez" because she and Mr. Mendez "were living together as a couple when the shooting occurred and thereafter married." Pet. App. 56a.

Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, he can no longer work yet has substantial, ongoing medical expenses, and Mrs. Mendez (who was pregnant at the time) was shot in the back and also has significant medical expenses.

In recent years, the Department of Justice has commendably attempted to deal with this type of problem by entering into a series of consent decrees that require municipal police departments to take steps to reduce police-created need for force.[2] In its January 2017 report on the Chicago Police

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[2] *E.g.*, Consent Decree, *United States of America v. City of Ferguson*, at 30 ("FPD will ensure ... that FPD officers ... [u]se de-escalation techniques and tactics to minimize the need to use force."); Settlement Agreement, *United States of America v. City of Cleveland*, at 12 ("[O]fficers will use de-escalation techniques whenever possible and appropriate, before resorting to force and to reduce the need for force."); Settlement Agreement and Stipulated Order of Resolution, *United States v. City of Seattle*, at 12 ("Officers should use de-escalation techniques, when appropriate and feasible, in order to reduce the need for force."); Consent Decree Regarding the New Orleans Police Department, *United States of America v. City of New Orleans*, at 15 ("[W]hen feasible based on the circumstances, officers will use disengagement; area containment; surveillance; waiting out a subject; summoning reinforcements; and/or calling in specialized units, in order to reduce the need for force and increase officer and civilian safety."); Agreement in Principle Between The United States and the City of Baltimore Regarding the Baltimore City Police Department, at 4 ("BPD will ensure its policies train and incentivize officers to use community policing and problem-solving techniques, including de-escalation, to decrease the need for officers to resort to force.").

Department, the Justice Department similarly objected to practices there which, by needlessly creating a need for force, had resulted in a number of civilian deaths. United States Department of Justice, Investigation of the Chicago Police Department at 5, 28, 37, 151 (Jan. 13, 2017). Those decrees and related proceedings would rest on a solid legal foundation if this Court were to hold, as Respondents urge, that the reasonableness standard in *Graham v. Connor,* 490 U.S. 386 (1989), applies to police action that foreseeably leads to the need for force. Such a holding would also protect police and the public by imposing liability where, as here, an officer's objectively unreasonable conduct foreseeably leads to a violent confrontation.

STATEMENT

1. The events giving rise to this action were the subject of a five-day bench trial, which involved a number of important factual disputes. The district court issued three detailed opinions: first a ruling from the bench (J.A. 234-42), then a lengthy set of findings of fact and conclusions of law (Pet. App. 55a-136a), and finally a substantial opinion in response to Petitioners' motion to amend the judgment or make additional findings (Pet. App. 27a-51a). Petitioners do not contend that any of the findings were clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *Anderson v. City of Bessemer City,*

N.C., 470 U.S. 564, 573 (1985) (same). Respondents identify the pertinent findings below.

The shooting of Mr. and Mrs. Mendez arose out of a search for someone else, Ronnie O'Dell, with whom they had no confirmed connection. Dkt. 301 at 159; J.A. 160-61, 210. O'Dell was a parolee-at-large, meaning that he was out of compliance with the terms of his parole. Dkt. 291 at 23-24. Apprehension of parolees-at-large was the responsibility of the Target Oriented Policing ("TOP") team in the Los Angeles County Sheriff's Department. Dkt. 299 at 77; Dkt. 291 at 23-24; Dkt. 300 at 34. The TOP team had an arrest warrant for O'Dell, but no search warrant to look for him in any house. Dkt. 291 at 20, 54; Dkt. 300 at 35; Pet. App. 57a, 63a, 66a.

Petitioners—Deputies Christopher Conley and Jennifer Pederson—were not members of the TOP team; on the day in question, they were assigned to work with that unit in the search for O'Dell. Pet. App. 56a-58a. "Prior to October 1, 2010, Deputies Conley and Pederson did not have any information regarding Mr. O'Dell." Pet. App 58a. On October 1, 2010, Conley was given no information indicating that O'Dell was armed or dangerous.[3]

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[3] A few months after the shooting, Conley told investigators he had not been given any information about whether O'Dell was armed or dangerous:

> Kim: What kind of crimes was that suspect wanted for?
>
> Conley: To my understanding, it was numerous thefts and possibly some narcotics related charges.

(continued . . .)

Pederson also testified that she was not given any such information at the time of the search. Dkt. 300 at 85 ("Q. Were you given any information about Mr. O'Dell? Did you know anything about him before this time? A. That he was a parolee at large. That was it."). The dozen deputies involved were merely "shown" a flyer with O'Dell's photograph. Dkt. 300 at 88.[4]

(. . . continued)

Kim: Did you have any information that he was armed and/or dangerous?

Conley: I heard in passing that he had been in times before, but as far as that day, I don't know whether he was armed or not and I didn't receive any information that he was.

Exh. 232-000052. At trial, Conley testified he could not recall being given any information at the time about whether O'Dell was armed or dangerous.

Q Somebody told you you were looking for a parolee-at-large.
A Yes, sir.
Q Did you know anything about Mr. O'Dell before that day?
A No prior history specifically on his criminal past.
Q Were you given any information that day that Mr. O'Dell was considered to be armed and dangerous?
A That I do not recall.
Q . . . [Y]ou stated on direct that you don't recall any information received at the briefing that Ronnie O'Dell was armed or dangerous; right?
A Not that I can recall.

Dkt. 291 at 50, 66.

[4] Petitioners state with regard to the officers who were involved in the search that "*[t]hey* knew O'Dell . . . was considered 'armed and dangerous.' Pet. App. 57a." Pet. Br. 4 (continued . . .)

The deputies looking for O'Dell first went to a store where he reportedly had been seen. Pet. App. 57a. Despite Petitioners' claim that O'Dell was armed and dangerous, no effort was made to clear the store, call a SWAT team, or take any other precautions before searching it. Dkt. 298 at 41. O'Dell was not found in the store. Pet. App. 58a. At about this time, one of the deputies, Claudia Rissling, told the other deputies that she had received by phone a tip from an informant that O'Dell had been seen riding a bicycle in front of a nearby house. *Id.* Rissling had a pre-existing

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(. . . continued)
(emphasis added). But the portion of the opinion at page 57a refers to the TOP team, not to anyone else involved in the search. The district court found that the TOP team "categorized" O'Dell as armed and dangerous. Pet. App. 57a. That categorization was not based on information about any particular parolee-at-large and was instead a "standard statement for all P.A.L. notifications." Pet. App. 37a-38a; Dkt. 301 at 99. Neither Conley, Pederson, nor anyone else testified that a member of the TOP team had told Conley or Pederson about that routine categorization. Petitioners also state that "[t]he team was shown a flyer that described O'Dell as 'armed and dangerous....'" Pet. Br. 5. There is no evidence that the twelve deputies were given individual copies to read, only that a copy of the flyer was used to show the deputies what O'Dell looked like: "They passed around a picture of him so we knew exactly what he looked like." J.A. 173. Neither Conley nor Pederson testified that either had done more than look at the photograph. J.A. 173, 214. Lastly, Petitioners' brief refers to O'Dell as "a wanted, armed-and-dangerous parolee." Pet. Br. 4 (emphasis omitted). Conley and Pederson knew only that O'Dell was a wanted parolee; in the courts below, Petitioners never asserted that O'Dell was armed and there is no evidence to support such a claim.

interest in that location and had conducted surveillance and observed who lived there. J.A. 205-06, 209. Rissling briefed Conley, Pederson, and the others about the location. There were, she told them, two residences: a larger house near the street and a smaller home in back. J.A. 208-09.

Rissling also told Conley and Pederson—and they heard her say—that the Mendezes lived in the smaller home. Pet. App. 59a. Addressing that precise issue, the district court found:

> Deputy Rissling announced to the responding officers that a male named Angel (Mendez) lived in the backyard of the Hughes resident with a pregnant lady (Mrs. Mendez).... *Deputies Conley and Pederson heard Deputy Rissling make this announcement.* Deputy Pederson testified that she heard the announcement. Deputy Conley testified that he did not recall any such announcement. Either he did not recall the announcement at trial or he unreasonably failed to pay attention when the announcement was made.

Id. (emphasis added); *see also id.* at 85a ("Conley and Pederson had information that a man and woman lived in the rear of the Hughes property."), 98a ("Conley had information that people lived in the rear of the Hughes property.").

Substantial evidence supports these findings. In an interview conducted after the shooting, Conley informed the investigating officer that he had been provided "info persons in rear shed." J.A.

72. In the transcribed interview, Conley stated: "we received information that there were sheds in the back yard and that someone might be staying in one of the sheds." J.A. 99. Pederson, too, told the investigator that he had been informed that "[p]ersons are known to loiter or stay in sheds on prop" (J.A. 73) and that both she and Conley were advised that "there was a shed back there"—referring to the backyard—and that "sometimes people stay in that shed or hang out in that shed" (J.A. 110). Deputy Rissling likewise testified: "I conducted a briefing and ... advised the deputies that ... there [were] sheds in the backyard and there was a male Hispanic named Angel that lived in one of the sheds along with a pregnant lady." Dkt. 300 at 69; *see also id.* at 77 ("Q. And you told them that a male Hispanic named Angel lives in the shed along with his female pregnant lady, correct? A. Correct.").[5]

Sergeant Gregg Minster led the group that went to the front of the main house. As the district court found:

> Sergeant Minster banged on the security screen outside the front door.... From within the Hughes residence, a woman

[5] Petitioners point to testimony by Conley and Pederson that they did not hear this part of Rissling's briefing (Pet. Br. 5), and the United States asserts that Conley did not hear Rissling's statement about the Mendezes living behind the house (U.S. Br. 2). As indicated in the findings quoted above, the district court did not credit that testimony and expressly found otherwise based on substantial evidence. Pet. App. 59a.

> (Ms. Hughes) asked what the officers wanted.... Sergeant Minster asked Ms. Hughes to open the door.... Ms. Hughes asked if the officers had a warrant.... Sergeant Minster said that they did not, but that they were searching for Mr. O'Dell and had a warrant to arrest him.

Pet. App. 63a. Minster "then heard running within the Hughes residence, toward the back of the residence." Pet. App. 64a. Minster decided to break into the house, and got a pick and ram from a police car. *Id.* Minster again asked Hughes to permit the officers to search her home, and now Hughes—knowing that the police were about to break down her door—agreed. *Id.* The district court found that her consent was coerced. Pet. App. 89a. After the deputies entered the house, Hughes "was pushed to the ground and handcuffed" and then confined in a patrol car. Pet. App. 64a. The search revealed no one else in her home. *Id.*[6]

Meanwhile, in the back yard, Conley and Pederson, after inspecting three small storage sheds along the side of the house, came to the shack where Respondents lived. J.A. 213. Specifically addressing Petitioners' arguments

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[6] Petitioners assert that "[*w*]*hile* speaking to Ms. Hughes, one of the officers heard 'running within the Hughes residence, toward the back of the [house]" and 'believed Mr. O'Dell was [inside].' Pet. App. 64a." Pet. Br. 5-6. If the running occurred at the back of the house while Hughes was in the front talking to Minster, there would have to have been a second person in the house. There was not. The conjunction in the district court's findings is "then," not "while." Pet. App. 64a.

regarding the shack, the district court found that Conley and Pederson "could not have 'reasonably assumed' that the shack was another storage shed." Pet. App. 85a. That was so, the court explained, for three reasons:

> First, Deputies Conley and Pederson differentiated (or should have differentiated) the shack from the three storage sheds next to (to the south of) the Hughes residence. The shack was located in a different area of the rear of the Hughes property at a distance from the Hughes residence and the storage sheds. The storage sheds were metal. The shack was wood.
>
> Second, Deputies Conley and Pederson observed (or should have observed) a number of objective indicia demonstrating that the shack was a separate residential unit: the shack had a doorway; the shack had a hinged wooden door and a hinged screen door; a white gym storage locker was located nearby the shack; clothes and other possessions also were located nearby the shack; a blue tarp covered the roof of the shack; an electrical cord ran into the shack; a water hose ran into the shack; and an air conditioner was mounted on the side of the shack.
>
> Third, and importantly, Deputies Conley and Pederson had information that a man and woman lived in the rear of the

> Hughes property. In light of this information ... Deputies Conley and Pederson could not have "reasonably assumed" that the shack was another storage shed.

Id.; *see also* Pet. App. 96a (discussing Petitioners' "unreasonable belief that the shack was not a dwelling"), 122a (noting "the multiple indicia of residency—including being told that someone lived on the property").

While Petitioners testified to a contrary perception, the district court did not find that testimony persuasive: "having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable." Pet. App. 67a. During the post-trial hearing to announce the decision, the district court likewise found that "the most important issue in the case ... was whether the failure of the deputies to recognize the shack as a dwelling was reasonable. And I have found and do now find that it was not." J.A. 239.

Petitioners continue to devote considerable effort to describing evidence regarding this issue (Pet. Br. 6-8, 10), but they do not suggest that the district court's findings were reversible error or that the existence of any such error would be within the scope of the question presented. *See Hana Fin. Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015) ("the delicate assessments of the inferences a reasonable [person] would draw ... are peculiarly one[s] for the trier of fact") (internal quotation

marks and brackets omitted). Nor are the district court's findings unsupported by evidence: the air conditioner can easily be seen in the photographs at J.A. 82 and 83, and the electrical cord, water hose, and white gym storage locker are plainly visible in the photograph at J.A. 82.[7]

Although the officers who wanted to search the main house had asked permission to do so, Conley and Pederson made no such request at the entrance to the Mendezes' home. Instead, as the district court found, Conley simply "opened the door (and pulled back the blanket) to a dwelling in which he knew—or should have known—people lived." Pet. App. 98a. As he entered the home, Conley did not identify himself as a police officer; he was completely silent. Dkt. 291 at 55-56. Because the Mendezes' home was only seven by seven feet, a reasonable person would have known that anyone inside would be only a few feet away when he entered. Conley also could have foreseen

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[7] Petitioners and the United States assert that the deputies could not have seen the air conditioner because it was on the north side of the Mendezes' home and they approached from the south. Pet. Br. 7; U.S. Br. 3. No such argument was made in the district court. To the contrary, Petitioners argued that the deputies could not have seen the air conditioner because it was "partially covered by tarps" (Pet. App. 49a), an argument that necessarily assumed the appliance was in their line of sight. Petitioners also assert that the electrical wire was "partially obscured by dirt and garbage." Pet. Br. 7. It can easily be seen at J.A. 82-83. In any event, as discussed in the text above, the district court rejected all such arguments based on the testimony and evidence at trial.

that the interior of the windowless shack might be dark, and Conley testified that his gun was drawn when he entered and that there was a light on the gun. *Id.* at 55.

When Conley began to enter the Mendezes' home, Mr. and Mrs. Mendez were resting on a futon with Mr. Mendez positioned closer to the door. Pet. App. 68a. Mr. Mendez had next to him a BB gun rifle, which he used to shoot at pests. Pet. App. 62a, 68a. "As the wooden door opened, Mr. Mendez picked up the BB gun rifle to put it on the floor of the shack so that he could put his feet on the floor of the shack and sit up." Pet. App. 68a.[8] Sadly, Conley could not tell that what Mendez was holding was a BB gun, and he mistakenly concluded that Mendez was holding a firearm with hostile intent. Pet. App. 67a, 69a.

Conley then shouted "gun," and both deputies began firing their weapons into the Mendezes' home. Pet. Br. 69a. The deputies fired a total of 15 bullets. Pet. App. 70a. "Mr. Mendez was shot in

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[8] Petitioners misleadingly refer to the BB gun as a "drawn gun" (Pet. Br. 6), describe Mr. Mendez as pointing the BB gun at Conley (Pet. Br. i ("a man pointing a gun at them"), 43 ("Mr. Mendez's own act of pointing the gun at the Deputies")), and even characterize Mr. Mendez as having "aimed" the BB gun (Pet. Br. 34). Mr. Mendez did not "draw" the BB gun, and there is no evidence, or contention, that he intended to point or aim it in any particular direction. The United States similarly describes Mr. Mendez as holding a "gun." *E.g.*, U.S. Br. 1 ("law enforcement officers . . . shot a man pointing a gun at them"). Whatever the government's intent, such language depicts circumstances fundamentally different than the facts of this case.

the right forearm, right shin, right hip/thigh, right lower back, and left foot.... Mr. Mendez's right leg was amputated below the knee.... Mrs. Mendez was shot in the right upper back/clavicle, and a bullet grazed her left hand." *Id.* Badly injured, Mr. Mendez shouted to the deputies, "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080.[9] "O'Dell was not in the shack or captured elsewhere that day." Pet. App. 70a.

2. Mr. and Mrs. Mendez brought this action against the County of Los Angeles and the two deputies, asserting both unreasonable search and excessive force claims. Starting with the Mendezes' unreasonable search claim based on the deputies' entry into the Mendezes' home without consent or a warrant, the district court found that the Mendezes' shack was a home within the protections of the Fourth Amendment and that Conley's entrance into the home violated the Fourth Amendment. Pet. App. 74a-99a. The deputies had

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[9] In describing the deputies' actions, Petitioners repeatedly refer to and invoke their subjective intent and perceptions. As the United States correctly notes, the reasonableness inquiry under the Fourth Amendment "is an objective one; it does not depend on the officer's 'underlying intent and motivation.'" U.S. Br. 8 (quoting *Graham*, 490 U.S. at 397). If an officer's subjective state of mind were a factor in these analyses, summary judgment would often be impossible. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). No party is urging this Court to hold that an officer's state of mind should be part of the reasonableness analysis in a Fourth Amendment case. A reference by this Court to the deputies' subjective beliefs would plainly set in motion a sea change in this area of the law.

no warrant to search the home and had not obtained consent to do so. The district court concluded that the search did not fall within any of the exceptional circumstances permitting such intrusions. Pet. App. 89a-97a. The court further held that the deputies had violated the "knock and announce" rule in *Wilson v. Arkansas*, 514 U.S. 927 (1995). Pet. App. 99a-105a.

As the district court correctly noted, the Mendezes also asserted two distinct excessive force claims. First, Respondents contended that the deputies' conduct at the moment of the shooting—evaluated without regard to the deputies' decision to enter the home—was by itself unconstitutional. The district court referred to this claim as "Fourth Amendment: Excessive Force (At the Moment of Shooting)." Pet. App. 106a. As Petitioners and the government note, Respondents largely conceded this claim in closing argument. Pet. Br. 11 (citing J.A. 230); U.S. Br. 12 (citing Pet. App. 108a). The district court rejected the claim. Pet. App. 135a.

Second, having effectively conceded the above claim, Respondents asserted "instead" that the deputies' actions constituted excessive force because they had created the incident that led to the need for force by entering their home in violation of the Fourth Amendment and without identifying themselves as police officers. Pet. App. 108a. The district court referred to this claim as "Fourth Amendment: Excessive Force (Provocation)." Pet. App. 109a. The district court found that Respondents had established this claim. Pet. App. 135a. The district court also found that the deputies' actions were the proximate cause of

Respondents' injuries and that Mr. Mendez's action in picking up the BB gun did not constitute a superseding cause. Pet. App. 123a-127a.

Lastly, the district court turned to the issue of damages. Referencing California Gov't Code § 825, the court had previously recognized (correctly) that "through the direct operation of the government code -- the county will write the check." Dkt. 300 at 24.[10] At the conclusion of the trial, the district court determined that the damages award would be roughly $4 million, which includes over $816,000 for medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez. Pet. App. 135a-136a. At the post-trial hearing to announce the court's decision, the court expressed the hope that the amount of the award "will go a long way towards making you financially whole" and "restore ... the dignity and self-sufficiency that you feel you have lost." J.A. 241-42.

3. Petitioners appealed, and a unanimous Ninth Circuit panel affirmed the district court's damages award on two independent grounds.

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[10] Indemnification of police officers is a universal practice. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014) ("Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases.").

First, the court of appeals agreed with the district court that "because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper." Pet. App. 22a. Second. the court of appeals also held that "the deputies are liable for the shooting under basic notions of proximate cause." Pet. App. 24a. Like the district court, the court of appeals concluded that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." Pet. App. 25a.

4. Petitioners thereafter filed a timely petition for rehearing en banc, which the Ninth Circuit denied. Pet. App. 137a-138a.

SUMMARY OF ARGUMENT

I. The third Question Presented in the Petition was "[w]hether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment?" Pet. ii. As can be seen, the question expressly referred to *intervening* and *superseding* cause principles and said nothing whatsoever about any other challenge to proximate causation. The Court did not grant certiorari—nor was it asked to do so—regarding the Ninth Circuit's holding that the deputies' unlawful conduct "proximately caused the plaintiffs' injuries." Pet. App. 22a. The Court also expressly

declined to grant certiorari regarding Petitioners' second Question Presented in the Petition (regarding qualified immunity), thus leaving in place the Ninth Circuit's holding that Petitioners violated clearly established law when they entered the Mendezes' home. Pet. App. 10a-15a.

Accordingly, the only causation issue before the Court is the one for which the Court granted certiorari: superseding cause. Because the lower courts' liability and proximate cause determinations are judicially final, the superseding cause issue—if decided in Respondents' favor—would be wholly dispositive of the appeal and would eliminate the need to reach the constitutional issue raised by Petitioners' first Question Presented. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint." (internal quotation marks and citations omitted)). Respondents therefore submit that the Court should begin with the superseding cause issue (*infra* § I) and reach the constitutional issue (*infra* § II) only if it is necessary to do so. Lastly, the Court should not address the proximate cause issue newly raised by Petitioners and their supporting amici because it is not fairly encompassed within the Questions Presented (*infra* § III).

II. As to each of these issues, Petitioners' arguments fail:

A. In this context, for a victim's conduct to be a superseding cause of injury, the conduct must be

unforeseeable or culpable. The district court repeatedly found that entering Mr. Mendez's home without warning could lead to a violent confrontation. The court also found that Mr. Mendez's conduct was not culpable—an issue that Petitioners in any event rightly conceded below. For these reasons, Mr. Mendez's conduct was not a superseding cause of Respondents' injuries.

B. The Ninth Circuit's consideration of events that precede the use of force is consistent with this Court's reasonableness test for deciding Fourth Amendment claims, including the required focus on the totality of the circumstances. Petitioners' proposed approach is not only inconsistent with the totality of the circumstances analysis, it leads to perverse and untenable results. Here, the deputies' pre-shooting conduct was objectively unreasonable (as well as unconstitutional) and foreseeably led to the use of force. If the Court reaches this constitutional issue, it should uphold the lower courts' liability rulings.

C. If the Court reaches the proximate cause issue (even though the issue is not fairly encompassed within the third Question Presented in the Petition), it should uphold the lower courts' rulings that Petitioners' unlawful conduct was a proximate cause of Respondents' injuries. Petitioners attempt to parse Respondents' claims and discern the underlying "purposes" of each constitutional right at issue. That analysis is both unnecessary and improper because Respondents prevailed on their excessive force claim and no one denies that gunshot wounds are within the scope of the risk created by an unlawful shooting. In any

event, an *additional* purpose served by the warrant clause is to avoid serious confrontations because of uncertainty regarding the legal authority for a non-consensual search. For these reasons and others, Petitioners' proximate cause argument also fails.

ARGUMENT

I. MR. MENDEZ'S STARTLED RESPONSE TO THE UNLAWFUL INTRUSION INTO HIS HOME BY INDIVIDUALS WHOM HE DID NOT KNOW WERE POLICE OFFICERS IS NOT A SUPERSEDING CAUSE.

A. Applying The Principles Of Foreseeability And Culpability To The Facts Presented Here Confirms That Mr. Mendez's Conduct Was Not A Superseding Cause Of Respondents' Injuries.

1. Because the Question Presented regarding superseding cause is wholly dispositive, it should be addressed before turning to the constitutional issue. The parties appear to agree on several bedrock principles governing superseding cause. Section 1983 was adopted against a background of tort law. Accordingly, Petitioners and Respondents agree that, under § 1983 as in other tort claims, a superseding cause protects the tortfeasor from liability. Pet. Br. 51-52. As this Court instructed in 1877, "[t]he inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475

(1877). Furthermore, the parties appear to agree that two principles drive that inquiry in this context: foreseeability and culpability.

First, all parties agree that courts look to the foreseeability of the potentially superseding cause. Pet. Br. 54-55; U.S. Br. 28. "A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (internal quotation marks and citation omitted); *see also* Restatement (Second) of Torts: Negligence § 442A, Westlaw (database updated Oct. 2016) (where defendant's conduct "creates ... the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause"); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 cmt. e, Westlaw (database updated Oct. 2016) (factors in analysis include unforeseeability of the intervening act). Moreover, the law is equally clear that an event is not a superseding cause if it led to the type of harm that was a foreseeable risk, even if that harm was brought about in an atypical manner. Restatement (Second) of Torts: Negligence § 442B cmt. b; Restatement (Third) of Torts § 34 cmt. e.

Second, Petitioners appear to recognize that the culpability of the allegedly superseding actor is a key factor in the analysis. *See* Pet. Br. 55 (arguing that tortious or criminal reaction to police constitutes superseding cause). The United States, in turn, expressly states that whether an intervening act supersedes the original tortious

conduct depends on "a variety of factors," including "whether the intervening act is 'unforeseeable, unusual, or *highly culpable*." U.S. Br. 28 (emphasis added) (quoting Restatement (Third) of Torts § 34 cmt e, at 572-73, and citing Restatement (Second) of Torts § 442, at 467-68). This Court, too, has looked to the culpability of a person's response to police action. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (officers would not be liable for death if plaintiff "had negligently or intentionally driven into" roadblock despite having opportunity to stop).

2. Petitioners and Respondents diverge, however, on how the principles of foreseeability and culpability apply to the facts here. Contrary to the position of Petitioners and some of their supporting amici (but notably not the United States[11]), it was foreseeable that entering the Mendezes' home without warning could lead to a violent confrontation, and Mr. Mendez's startled response was not culpable. For these reasons, Mr. Mendez's conduct was *not* a superseding cause of Respondents' injuries.

First, it was foreseeable that entering the Mendezes' home without warning could lead to a violent confrontation. The district court made *repeated* findings addressing this precise issue. At the conclusion of the trial, the court commented:

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[11] The United States indicates only that Mr. Mendez's conduct "may" be a superseding cause that precludes liability, but does not address the issue further. U.S. Br. 32 n.4.

> [T]he Second Amendment gives Americans the right to have firearms in their own home for their protection. And this is particularly true out in the Antelope Valley where there's obviously a lot of ex military and a lot of ex law enforcement. But any American can sleep with a firearm, many Americans do.

J.A. 224-25. In comments to the lawyers about post-trial briefing, the court similarly noted:

> [E]specially since there's a Second Amendment right to have firearms in the home for protection, you know, there must be hundreds of thousands of bedrooms in which if law enforcement or anyone, you know, went in without announcing themselves would have provoked reaction. You know, there's many, many people, you know, sleep with firearms within arms' reach. It's not a rare occurrence

J.A. 231. The district court likewise found in its written findings that it was "foreseeable" that unlawfully entering the Mendezes' home "could lead to a violent confrontation." Pet. App. 126a.

In so holding, the court recognized, "[a]s Justice Jackson foretold," that "a foreseeable risk of an unreasonable search is that the offending officers will be threatened by the resident." Pet. App. 126a (citing *McDonald v. United States*, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). The district court similarly recognized that "[a] startling entry into a bedroom will result in

tragedy." Pet. App. 127a. These findings—amply supported by evidence, legal precedent, and common sense—are not clearly erroneous.

Indeed, the state of California specifically recognizes that an unlawful and forcible entry of the home—such as someone unlawfully barging in with a drawn gun—may result in the resident using deadly force against the intruder. *See* Cal. Penal Code § 198.5 (resident using deadly force against person who "unlawfully and forcibly enters" home shall be presumed to have reasonably feared imminent peril of death or great bodily injury); Cal. Civ. Proc. § 1159 (person guilty of "forcible entry" who breaks open doors "or by any kind of violence or circumstance of terror enters"). Thus, a deputy with a drawn gun entering a home without consent could reasonably anticipate finding himself face-to-face with a resident threatening or appearing to threaten deadly force.

Second, Mr. Mendez's moving his BB gun in response to hearing Conley open the door to his home was not culpable (and it certainly was not "highly culpable," U.S. Br. 28). The record shows—without dispute—that Mr. Mendez had *no idea* that the person coming into his home was a deputy sheriff. Instead, as Mr. Mendez testified and the district court found, he was "startled" and thought it was Hughes. Pet. App. 68a; JA 139; Dkt. 302 at 51. Conley and Pederson did not ask for consent to enter, and they were completely silent. Dkt. 291 at 55-56. A few seconds and fifteen bullets later, Mr. Mendez painfully confirmed: "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080. Consistent with this evidence,

Petitioners' counsel expressly conceded during his closing argument that Mr. Mendez "didn't do anything wrong." J.A. 233. The district court said the same thing: "Mr. Mendez, you and your wife did nothing wrong." Dkt. 302 at 57. Mr. Mendez's conduct was entirely *nonculpable*, and for that additional reason is not a superseding cause of Respondents' injuries.

B. The Superseding Cause Arguments Of Petitioners And Their Supporting Amici Are Without Merit.

Despite their admission that Mr. Mendez "didn't do anything wrong" (J.A. 233), Petitioners argue for a bright-line rule that "when an individual points a gun at a law enforcement officer, that is a superseding event that breaks the chain of causation from prior unlawful conduct." Pet. Br. 19. On Petitioners' view, a homeowner has only himself or herself to blame, and no legal recourse whatsoever, if he or she picks up a firearm (or what appears to be a firearm) to fend off an unidentified and unlawful intruder (or for any other reason) and is then shot by an unidentified police officer. That argument is untenable.

1. Petitioners' primary argument is that, in many confrontations with police, an individual's reaction that the police reasonably perceive as a threat may constitute a superseding cause. Pet. Br. 52-53; *see also* U.S. Br. 29-30. In some circumstances (not presented here), that may be true. But the cases relied on by Petitioners and their amici do not support their argument that superseding cause would exist in *all* such

circumstances. To the contrary, the cited cases find superseding cause when individuals created a perceived threat to police officers *despite knowing or having reason to know that they were officers*:

- In *Kane v. Lewis*, 604 F. App'x. 229 (4th Cir. 2015), the officers repeatedly yelled "police" and the court of appeals reasoned that the resident's deliberate attack on the police was a superseding cause of his death precisely "[*b*]*ecause* [he] must have known that the men in his apartment were police officers, yet advanced toward them with a knife." *Id.* at 230, 237 (emphasis added).
- In *James v. Chavez*, 511 F. App'x. 742, 747 (10th Cir. 2013), it was "apparent from the numerous interactions between [the decedent] and the people outside his home that he knew they were police officers." The court specifically commented that a homeowner is not entitled under state law to "resist[] an unlawful arrest or entry into his home, simply because of its unlawfulness, *by individuals he recognizes to be the police*." *Id.* (emphasis added).
- The confrontation in *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011), began when the decedent approached a police officer to ask for directions. *Lamont v. New Jersey*, Civil No. 04-2476, 2009 WL 483899, at *2 (D. N.J. Feb. 25, 2009). The situation evolved into a police chase down the freeway and then a pursuit by foot, before officers surrounded the decedent and shot

him for moving his hand as if drawing a gun. *Lamont*, 637 F.3d at 179-80.

- In *Hundley v. District of Columbia*, 494 F.3d 1097, 1100 (D.C. Cir. 2007), the officer yelled "police" when he ordered the driver to stop and get out of his car. The court concluded that it was the decedent's "intentional misconduct" in refusing to comply with orders to place his hands on the car and instead lunging at the police officer that constituted a superseding cause of the shooting. *Id.* at 1104-05.

- In *Estate of Sowards v. City of Trenton*, 125 F. App'x 31 (6th Cir. 2005), one of the officers "*identified himself as a Trenton Policeman* and requested that [the decedent] exit his apartment to speak with the officers." *Estate of Sowards v. City of Trenton*, No. 02-CV-71899-DT, Order Granting in Part and Denying in Part Defendants' "Motion for Summary Judgment," at *3 (E.D. Mich. Mar. 14, 2003) (emphasis added). The decedent refused and was shot after pointing a hand gun at police when they forced open his door. 125 F. App'x at 34.

- In *Cameron v. City of Pontiac*, 813 F.2d 782, 783-84 (6th Cir. 1987), "uniformed" officers, "while on regular patrol," "identified themselves as police" before ordering fleeing suspects to halt. The decedent's choice to instead scale a fence and attempt to cross a freeway on foot was,

according to both the district court and the court of appeals, a superseding cause of his death. *Id.* at 786.

- Finally, the oft-cited hypothetical in then-Judge Alito's opinion in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), involved police officers who "encounter the suspect, identify themselves, [and] show him the warrant."

If Conley and Pederson had done what then-Judge Alito posited in *Bodine*, Mr. Mendez's conduct *could have been* a superseding cause of his injuries. But on the facts presented here, Petitioners were and remain liable for their actions.

2. Petitioners also argue that Mr. Mendez's conduct constituted a superseding cause of the shooting because "[r]esisting or threatening a *uniformed* police officer who does nothing to incite a violent response is not only unforeseeable, it is tortious and even criminal." Pet. Br. 55 (emphasis added). The United States likewise argues that "[s]ociety generally expects a person confronted by a *uniformed* police officer to follow the officer's instructions rather than violently resisting." U.S. Br. 29 (emphasis added). Here again, a key assumption is built into the word "uniformed," which is that the person understands that the officer *is* an officer. It is culpable and not usually foreseeable for a person to react violently towards someone whom he or she *knows is a law enforcement officer*. But that is not what happened here.

Although Petitioners cite California Penal Code § 834a and Model Penal Code § 3.04(2)(a)(i) in support of their arguments (Pet. Br. 55), neither statute prohibits resistance to arrest if the arrestee does not know that the officer *is* an officer. *See* Cal. Penal Code § 834a (duty to refrain from resistance "[i]f a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer"); Model Penal Code § 3.04(2)(a)(i) (use of force not justified "to resist an arrest which the actor knows is being made by a peace officer"). The statutes of numerous states are to the same effect.[12]

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[12] *See, e.g.*, Ala. Code § 13A-3-28 ("a peace officer who is known or reasonably appears to be a peace officer"); Ark. Code Ann. § 5-54-103(a)(1) ("a person known by him or her to be a law enforcement officer"); Colo. Rev. Stat. Ann. § 18-8-103(3) ("a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person"); Del. Code. Ann. tit. 11, § 464(d) ("an arrest which the defendant knows or should know is being made by a peace officer"); Fla. Stat. Ann. § 776.051(1) ("known, or reasonably appears, to be a law enforcement officer"); 720 Ill. Comp. Stat. Ann. 5/7-7 ("arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Iowa Code Ann. § 804.12 (arrest "which the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Mont. Code Ann. § 45-3-108 ("arrest that the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer"); Neb. Rev. Stat. § 28-1409(2) ("arrest which the actor knows is being made by a peace officer"); N.H. Rev. Stat. Ann. § 594:5 ("has reasonable ground to believe . . . that the arrest is being made by a peace officer"); N.Y. Penal Law § 35.27 ("when it would reasonably appear that the latter is a police officer or peace officer"); Or. Rev. Stat. § 161.260 ("a (continued . . .)

Moreover, in *Sparks v. City of Compton*, 134 Cal. Rptr. 684, 688 (Cal. Ct. App. 1976), the California Court of Appeal confirmed that officers who "fail[] to identify themselves as officers either by word or indicia of authority" relieve a person of the statutory obligation to yield to arrest. Society, then, recognizes that a person confronted by an unknown individual (particularly one who unlawfully enters a residence) may defend himself or herself if it is not discernible that the unknown individual is a police officer. Here, it was not discernible to Mr. Mendez. "I didn't know it was you guys. It was a BB gun, I didn't know." Exh. 232-000080.

3. Finally, some of Petitioners' amici contend that, in light of the tragic frequency of violence directed at law enforcement officers, the mere probability that violent conflicts will elicit the use of defensive force by police should not be dispositive. Nat'l Ass'n of Counties Br. 26. The superseding cause doctrine addresses that concern. In a case of this type, the superseding cause analysis is appropriately informed by both foreseeability and culpability principles. Here, the

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peace officer who is known or reasonably appears to be a peace officer"); 18 Pa. Cons. Stat. Ann. § 505(b)(1)(i) ("an arrest which the actor knows is being made by a peace officer"); R.I. Gen. Laws § 12-7-10 ("has reasonable ground to believe . . . that the arrest is being made by a peace officer"); Tex. Penal Code § 38.03(a) ("a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction").

district court made repeated foreseeability findings and did not find culpability (a point that was in any event conceded based on the evidence). For all these reasons, Mr. Mendez's conduct is not a superseding cause of Respondents' injuries.

II. THE LEGAL FRAMEWORK SET OUT IN *GRAHAM* PERMITS COURTS TO CONSIDER WHETHER ACTIONS BY POLICE FORESEEABLY CREATE A NEED FOR THE USE OF FORCE.

If the Court reaches the constitutional issue in Petitioners' first Question Presented, it should likewise uphold the district court's judgment in Respondents' favor. The parties agree that *Graham* provides the controlling rule of decision, but disagree as to whether that rule permits consideration of events that precede the use of force. As set forth below, the better reasoned authority permits consideration of such events, and Respondents respectfully urge the Court to so hold.

As Petitioners note, lower courts have applied a variety of standards in evaluating the constitutionality of officials' actions that foreseeably create a need for force. The Ninth Circuit below clarified that liability may attach if a police officer's "unconstitutional conduct created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." Pet. App. 22a. In *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the court likewise held that if a plaintiff can establish such unconstitutional conduct, then "liability is established, and the question becomes the scope of

liability, or what harms the constitutional violation *proximately caused*." *Id.* at 1189-90 (emphasis added).

Other circuits have sustained excessive force claims based on official action creating a need for force *without* requiring that the prior action itself be a separate constitutional violation. In *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1657 (2016), the Tenth Circuit held that "[t]he reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Courts have emphasized that this approach "is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *see also Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) ("This approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard." (quoting *Garner*, 471 U.S. at 8-9)). Other appellate courts have likewise adopted this approach.[13]

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[13] *See, e.g., Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (finding fact issues regarding an excessive force claim based on evidence that the officer caused the conduct (the suspect "turn[ed] reflexively down and away from the breaking window" and thereby appeared to be "reaching for a weapon")

(continued . . .)

Conversely, as Petitioners and their amici note, some other circuits hold that "[t]he proper approach ... is to view excessive force claims in segments" and "disregard" events in earlier segments when determining whether an officer used excessive force in a later segment. *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007). Despite *Livermore*, the Sixth Circuit subsequently held in *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive." Petitioners nonetheless claim that the "segmenting" approach is mandated by both *Graham* and this Court's post-*Graham* cases. For the reasons that follow, Petitioners are incorrect.

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that arguably permitted the use of deadly force); *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) ("Viewed in the light most favorable to Sledd, the evidence shows that Baker's act of shooting Sledd at the top of the stairs was unjustified, even assuming that the police still had some right of self defense after they had broken into the house and failed to identify themselves or to announce their purpose."); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer cannot lawfully use deadly force to protect himself if he "unreasonably created the encounter that ostensibly permitted the use of deadly force"); *Sigley v. City of Parma Heights*, 437 F.3d 527, 534-35 (6th Cir. 2006) (citing *Starks* with approval and recognizing, as in *Starks*, that "determining whether the officer placed himself in danger is a factual inquiry that should be resolved by the factfinder").

A. Petitioners' Proposed Framework Is Contrary To Decisions Of This Court, Including *Graham*, And Leads To Indefensible Results.

1. Despite their assertion that the Court should "continue to analyze police use of force under the established legal framework set out in *Graham*" (Pet. Br. i), Petitioners' proposed approach is not consistent with *Graham*. The Court in *Graham* emphasized that "proper application" of the reasonableness test under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case." 490 U.S. at 396. Quoting *Garner*, 471 U.S. at 8-9, the Court reiterated that the question is "whether the *totality of the circumstances* justifie[s] a particular sort of ... seizure." *Graham*, 490 U.S. at 396 (emphasis added; brackets and ellipsis in original). The Court thus required lower courts to carefully consider *all* of the relevant facts and circumstances and *did not hold* that any facts or circumstances should be ignored in deciding Fourth Amendment claims.

Petitioners assert a contrary interpretation of *Graham*. Because *Graham* refers to the reasonableness of an officer's actions "at the moment" (*id.*), Petitioners argue that an officer's actions before the seizure are not relevant. Pet. Br. 29. That is a misreading of *Graham*. As the rest of the passage in question makes clear, the "at the moment" phrase was not intended to preclude consideration of what preceded the use of force, but only to focus the analysis on "the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of *hindsight*." *Graham*, 490 U.S. at 396 (emphasis added). The Court added that "[n]ot every push or shove, even if it may *later* seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id.* (emphasis added; internal quotation marks and citation omitted). The "at the moment" requirement is properly read to preclude lower courts from second-guessing the actions of police officers after the fact; it does not require courts to pretend that critically important events leading to the use of force did not occur.

Petitioners' proposed framework is also contrary to any reasonable interpretation of the phrase "totality of the circumstances." As the Third Circuit noted in *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999), it is not possible to reconcile this Court's rule "requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force." *Id.* Moreover, if the seizure is the bullet striking Mr. and Mrs. Mendez, then the circumstances before that moment—which Petitioners claim should be disregarded—would include "what [the officer] saw when she squeezed the trigger." *Id.* As the court in *Abraham* noted, courts that disregard pre-seizure circumstances "are left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible

justification for why conduct prior to that chosen moment should be excluded." *Id.* at 291-92.

The government appears to recognize the problem that the court identified in *Abraham*. Addressing the relevance of prior events, the government states:

> This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for "the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, including "what the officer knew at the time" he decided to use force, *Kingsley*, 135 S. Ct. at 2473; *see Plumhoff*, 134 S. Ct. at 2023 (The "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she faced.").

U.S. Br. 25. Here, the relevant "facts and circumstances" and "what the officer knew at the time" would include Rissling's announcement (which Conley and Pederson heard) that "a male named Angel (Mendez) lived in the backyard of the Hughes resident with a pregnant lady (Mrs. Mendez)" and clear signs that the shack was precisely that residence. Pet. App. 59a, 85a. Yet Conley and Pederson decided to enter the Mendezes' home with guns drawn and without asking permission, identifying themselves, or even knocking on the door.

Indeed, in cases such as this one, the pre-use-of-force conduct by the officer and victim (and perhaps others) is as a practical matter the *only*

action to which *Graham* could meaningfully be applied. Petitioners stress that police officers are often "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." Pet. Br. 17 (quoting *Graham*, 490 U.S. at 396-97). But in this case, the person who "forced" Conley to make that decision was Conley himself, by entering a small, dark residence without examining the shack and area around it—which would have confirmed that the shack was inhabited—and without first alerting the occupants. Although there may be a need for a split-second decision once an officer is in an apparently life-threatening situation, the decision that got the officer into that situation is often far less hurried. And here, that pivotal decision was manifestly unreasonable—as both courts below found. Pet. App. 13a-14a, 125a.

2. Far from supporting Petitioners' segmented approach, this Court's post-*Graham* cases suggest (without expressly holding) that an excessive force claim can properly be based on official action foreseeably creating a need for force. In *Scott v. Harris*, 550 U.S. 372, 384-85 (2007), for example, the plaintiff based his excessive force claim in part on an argument that police had created the need for force by unreasonably chasing him at a high rate of speed. Petitioners assert that the Court refused to consider that claim and that "it was only the final step—'terminat[ing] the chase by ramming [the officer's] bumper into respondent's vehicle'—that ... the Court evaluated for reasonableness." Pet. Br. 30 (quoting *Scott*, 550 U.S. at 381, 383). That is not correct. The Court in

Scott devoted two paragraphs to the reasonableness of the officer's pre-crash actions; it rejected the plaintiff's contentions *not as legally irrelevant* as Petitioners assert, but on the merits. 550 U.S. at 384-85.

In *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), the plaintiff likewise argued that the police had improperly created the asserted need for force by initiating a high speed chase. Addressing this portion of *Plumhoff*, Petitioners assert that "[t]his Court held that this line of argument was improper" and "explicitly rejected the argument that it should evaluate whether the officer's conduct leading up to the chase, or their conduct throughout the chase, was reasonable." Pet. Br. 31-32. To the contrary, the Court in *Plumhoff* expressly did evaluate that line of argument and rejected it as *factually unpersuasive* rather than as legally irrelevant. 134 S. Ct. at 2021 n.3 (citing *Scott*, 550 U.S. at 385-86).

Likewise, in *Brower*, the Court held that the use of the roadblock in that case constituted a seizure and remanded the case for an assessment of the reasonableness of the police actions. 489 U.S. at 599-600. Petitioners insist that the remand in *Brower* "limited the reasonableness inquiry to the final moment of the ultimate seizure." Pet. Br. 33. That assertion, too, is incorrect: contrary to Petitioners' assertion, the issue on remand was the reasonableness of the official actions "*setting up* the roadblock in such manner as to be likely to kill him." *Brower*, 489 U.S. at 599 (emphasis added). The creation of that roadblock had necessarily occurred well before the final moment of the

seizure. It simply is not the case that *Scott*, *Plumhoff*, and *Brower* hold that an "officer's actions before the seizure—even in the seconds immediately before the seizure—are not relevant to the reasonableness of the seizure." Pet. Br. 16.

3. In other contexts, the Court's Fourth Amendment analysis also encompasses preceding events. In *Kentucky v. King*, 563 U.S. 452 (2011), for example, the Court held that a warrantless search of a home is ordinarily permissible if "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Id.* at 460 (internal quotation marks and citation omitted; brackets in original). But the Court held that police can invoke exigent circumstances only "when the conduct of the police *preceding the exigency* is reasonable" and "the police did not *create the exigency* by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id.* at 462 (emphases added). As can be seen, the Court expressly considered whether the officer's prior conduct is reasonable in determining whether the officer can lawfully search a home under the Fourth Amendment.

In so holding, the Court expressly recognized that "[w]e have taken a similar approach in other cases involving warrantless searches." *Id.* For example, the Court has "held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." *Id.* at 462-63 (citing *Horton v. California*, 496 U.S. 128, 136–40 (1990)).

It has likewise held that officers may seek consent-based encounters only "if they are lawfully present in the place where the consensual encounter occurs." *Id.* at 463 (citing *INS v. Delgado*, 466 U.S. 210, 217, n.5 (1984)). As can be seen, the Court has previously recognized that an officer's prior conduct is relevant in assessing whether the officer violated the Fourth Amendment. There is no reason to apply a different rule to excessive force claims.

Because the prohibitions now embodied in the Fourth Amendment first emerged through common law tort actions against government officials, tort principles are important in interpreting the constitutional requirements. In tort, the assessment of a defendant's liability also is not limited to the very moment when the defendant took the action that injured the plaintiff. It is not usually a tort for A to defend himself from a threat of force by B, but A cannot do so if (1) he is a trespasser, (2) B is threatening force because he reasonably believes A is dangerous, and (3) A is either dangerous or is responsible for B's mistake in thinking A to be dangerous. *See* Restatement (Second) of Torts §§ 65, 72, 79; *see also id.* § 72 cmts. a-c. Likewise, in criminal law, if A starts a fight with B and B fights back, A's subsequent use of force is tortious unless A first made clear his intent to withdraw from the fight. *See* 2 Charles E. Torcia, *Wharton's Criminal Law* § 135, Westlaw (database updated Sept. 2016); Model Penal Code § 3.09(2) (1985). Lower courts have applied that tort principle—which requires consideration of

events before the moment force is employed—to police officers who started fights.[14]

4. A holding by this Court that the analysis of an excessive force claim is limited to the knowledge and actions of the officer at the precise moment that force is used also would bar redress in a troubling range of situations. If a plainclothes police officer climbed through a bedroom window in the middle of the night without identifying himself and then killed a resident who pointed a weapon in fear, the officer's fatal shooting of the resident would constitute a reasonable use of force. *But see McDonald*, 335 U.S. at 460-61 (Jackson, J., concurring). And if a police officer jumped in front of a moving car and then shot the driver to stop the car, the killing of the motorist would constitute a reasonable use of force. *But see Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993). And if a police officer were called to the house of a deranged man, who was home alone shouting incoherently and swinging a golf club, the officer was warned that if he entered the house the man would attack him with the club, and the officer nonetheless entered the house and was attacked as predicted, the officer's killing of the mentally ill man would

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[14] *See, e.g., Claybrook v. Birchwell*, 274 F.3d 1098, 1103-05 (6th Cir. 2001); *Plakas v. Drinski*, 19 F.3d 1143, 1147-48 (7th Cir. 1994); *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989); *Miller v. Leesburg*, Nos. 97APE10-1379, 97APE10-1380, 1998 WL 831404 at *1 (Ohio Ct. App. Dec. 1, 1998).

constitute a reasonable use of force. *But see Estate of Crawley v. McRae,* No. 1:13-CV-02042-LJO-SAB, 2015 WL 5432787, at *28-33 (E.D. Cal. Sept. 15, 2015).

Similarly, assume that the officer in *Scott* had driven up alongside Harris's car, in plain clothes and an unmarked car, and began screaming and pointing a gun at Harris. Harris would reasonably have concluded that the other driver was dangerous, if not deranged, and might well have tried to escape. This Court's decision in *Scott* cannot properly be read to hold that in those circumstances—evaluated "at the moment" the driver was seeking to escape from the unidentified officer—Harris would have had no claim if the officer had run him off the road to end the chase. Yet that is the logical outcome of Petitioners' proposed "in the moment" framework. That framework is not only inconsistent with the "totality of the circumstances" analysis, it leads to perverse results.

B. The Court Should Adhere To The General Standard Of Reasonableness Established By *Graham* And *Scott*.

1. Respondents respectfully submit that the Court should adopt the following standard: in resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*. Under *Graham*, whether that prior police action was reasonable "requires a

careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotation marks and citation omitted). Consideration would also be given to the "relative culpability" of involved individuals (*Scott*, 550 U.S. at 384), and all such issues would be assessed from the perspective of "a reasonable officer on the scene" (*Graham*, 490 U.S. at 396).

Petitioners and the United States focus their arguments largely on the Ninth Circuit standard that *preceded* the appellate court's decision below, which clarified that the Ninth Circuit "does not indicate that liability may attach only if the plaintiff acts violently; we simply require that the deputies' unconstitutional conduct created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." Pet. App. 22a (internal quotation marks and citation omitted). In any event, disputes about the details of the Ninth Circuit standard are not helpful in delineating the correct standard, which is the balancing test set forth in *Graham* and repeatedly applied by lower courts. That test differs from the Ninth Circuit's analysis in that it requires objectively unreasonable conduct rather than an independent constitutional violation. But because the deputies' search of the Mendezes' home in this case was both an independent constitutional violation and objectively unreasonable, that difference is immaterial here.

Applying such a balancing test is simple and straightforward. Action involving a high likelihood

of creating a need for force would be justified in circumstances involving culpable conduct, such as police entering a room in which armed robbers are holding a hostage. Conversely, a relatively modest likelihood of creating a need for force would *not* be justified if the action in question served no apparent governmental interest, such as the failure of plainclothes officers to identify themselves as police when they accost civilians.[15] It would not be relevant whether the officer intended that his or her action would create a need for force. *See supra* at note 9. Instead, as the government states, the "crucial question" is and remains "whether the official acted reasonably in the particular circumstances that he or she faced." U.S. Br. 25 (quoting *Plumhoff*, 134 S. Ct. at 2023).

2. Applying this balancing test to the facts presented in this case, the district court's detailed findings amply support its judgment based on the deputies' unreasonable conduct leading to the use of force. Pet. App. 109a-127a, 135a. Starting with the governmental interest at issue, Petitioners contend that the person police were searching for was "armed and dangerous parolee." Pet. Br. 4. But neither Conley nor Pederson had information that the parolee was armed or dangerous, so it is

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[15] *See* United States Department of Justice, Investigation of Chicago Police Department at 31 (Jan. 13, 2017) (criticizing "jump out" tactic, in which a group of gun wielding officers suddenly accost a group of pedestrians to see who will flee, noting that it "can be particularly problematic when deployed by [the Chicago Police Department] using unmarked vehicle[s] and plainclothes officers").

irrelevant to an analysis of "the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. Moreover, "the deputies lacked any credible information that [O'Dell] was in Plaintiffs' shack." Pet. App. 14a. Indeed, Conley admitted in the district court that he "didn't have a specific belief that [O'Dell] was in fact in there." Pet. App. 37a (quoting Dkt. 291 at 85). Any governmental interest in entering the Mendezes' home without the deputies first seeking consent or identifying themselves (as the officers at Ms. Hughes' home had done moments earlier) was attenuated at best

Conversely, the deputies' intrusion on the Mendezes' Fourth Amendment rights was profound. In *Payton v. New York*, 445 U.S. 573 (1980), the Court recognized that the Fourth Amendment "unequivocally establishes the proposition that 'at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* at 589-90 (alterations and citation omitted). In a passage that is particularly fitting here—from William Pitt's address in the House of Commons in 1763 that "echoed and re-echoed throughout the Colonies"—the Court added:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

Id. at 601 n.54 (internal quotation marks omitted). This case concerns the modest dwelling of which Pitt spoke. The deputies nevertheless decided to enter "the unambiguous physical dimensions" of the Mendezes' home (*id.* at 589), and they did so without a warrant, without consent, without warning, and with guns drawn—conditions that were likely to result in serious injury or death to Mr. and Mrs. Mendez. This conduct violated the Mendezes' constitutional rights, as both courts below found. Pet. App. 13a-15a, 135a.

Lastly, the balance of culpability also favors Respondents. Mr. Mendez's conduct, as noted previously (*supra* at 24-25), was entirely and *admittedly* nonculpable. Indeed, unlike many police shooting cases, Mr. and Mrs. Mendez had not committed *any* crime and were not even suspected of doing so; they were simply resting on a futon in their own home. App. 56a. Petitioners, in contrast, engaged in an unconstitutional search—and the unlawfulness of that conduct is now judicially final. But for that unlawful conduct, the use of force would not have been necessary, Mr. and Mrs. Mendez would not have been repeatedly shot by Conley and Pederson, and Mr. Mendez would still be able to work and would not be saddled with ongoing medical expenses for prosthesis upkeep and replacement, pain medication for significant nerve damage, and future surgeries. Dkt. 299 at 41-44; Pet. App. 135a-136a. This balance of culpability consideration, like the other relevant considerations, confirms the district court's finding that Petitioners' actions were unreasonable.

3. Considering events that precede the use of force also does not undermine qualified immunity or proximate cause principles or threaten the safety of officers or the public, as Petitioners and their amici claim.

a. Starting with qualified immunity, the required analysis is simple and straightforward. As the Ninth Circuit noted, "'the salient question ... is whether the state of the law' at the time of the events (here, October 2010) gave the deputies 'fair warning' that their conduct was unconstitutional." Pet. App. 7a-8a (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The courts below had no difficulty applying that analysis to the deputies' conduct (Pet. App. 7a-15a, 97a-99a, 123a), and this Court expressly declined to review that determination when it limited the grant of certiorari to Petitioners' first and third Questions Presented. Petitioners' qualified immunity argument (Pet. Br. 36-40) is thus incorrect as well as procedurally improper.

b. Nor does consideration of events that precede the use of force somehow "override" basic tort principles of proximate cause and superseding cause, as Petitioners also claim. Pet. Br. 40-42. With or without the Ninth Circuit's so-called provocation analysis, excessive force claims are and remain subject to the same limitations as other Fourth Amendment claims: the plaintiff must establish that the action in question was a proximate cause of the injury at issue, and the defendant can avoid liability by establishing that some other event was a superseding cause.

The problem for Petitioners here is that *the facts* do not support their arguments. As noted previously (*supra* at 22-24), the district court squarely addressed this precise issue and made *repeated* findings that it was foreseeable that the actions of the deputies in entering the home without consent and without identifying themselves as police officers could lead to a violent confrontation. In addition to the district court's remarks during trial regarding the prevalence of firearms in the surrounding area (J.A. 224-25, 231), the court expressly found based on the evidence and testimony at trial that it was "foreseeable" that unlawfully entering the Mendezes' home "could lead to a violent confrontation." Pet. App. 126a. The Ninth Circuit agreed with that finding and similarly so held. Pet. App. 24a-25a. And as the above discussion also shows (*supra* § I), Mr. Mendez's *nonculpable* response to Petitioners' unlawful conduct is not a superseding cause of Respondents' injuries.

c. Lastly, considering events that precede the use of force also does not undermine officer safety. To the contrary, a rule that imposes liability for *objectively unreasonable* conduct protects both police and the public. As the Sixth Circuit noted in *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991), "[a]n officer who intentionally enters a dark hallway in the entrance of a private residence in the middle of the night, and fails to give any indication of his identity, is more than merely negligent." The same reasoning applies here, where Conley and Pederson unreasonably decided to enter the Mendezes' home—despite Rissling's

announcement and signs of habitation—and did so with guns drawn, without consent, without a warrant, and without identifying themselves as police officers. Both officers and the public alike are safest when police respect such boundaries.

* * *

In sum, the objective reasonableness test is based on existing precedent (including *Graham* and *Scott*), has been applied by lower courts, is expressed in terms that police officers can easily understand and apply, and will appropriately resolve the safety concerns identified by Petitioners' supporting amici. Respondents respectfully urge the Court to adhere to that test.

III. IF THE COURT ADDRESSES PROXIMATE CAUSE, THE ISSUE SHOULD BE RESOLVED IN RESPONDENTS' FAVOR.

A. Petitioners' Proximate Cause Argument Is Not Fairly Encompassed Within The Question Presented.

The third Question Presented in the Petition related solely to whether "an incident giving rise to a reasonable use of force is an intervening, superseding event." Pet. ii (emphasis omitted). The petition asserted that there was a conflict regarding superseding cause and asserted that "[r]eview is ... warranted to determine whether an incident giving rise to a *reasonable* use of force is an intervening, superseding event...." Pet. 15, 33-35. Petitioners have now *rewritten* that Question Presented to refer to "proximate cause" rather than an "intervening, superseding event." *Compare* Pet.

Br. i *with* Pet. ii. The United States has done the same. *See* U.S. Br. I.

This Court has repeatedly admonished parties not to introduce at the merits stage additional legal issues which they chose not to proffer as questions at the certiorari stage. *E.g., Fry v. Pliler,* 551 U.S. 112, 120 (2007) (refusing to consider issue "not fairly encompassed within the question presented"). That admonition is entirely applicable to this case. Petitioners advance no contention that the proximate cause issue is fairly encompassed in the original third Question Presented. It is not. Superseding cause is a single aspect of the larger proximate causation analysis, not the other way around. Had Petitioners sought—and the Court granted—certiorari on the question whether the courts below correctly found proximate cause, Petitioners might now properly argue both proximate causation and the narrower, subsidiary issue of superseding cause. But they violate Supreme Court Rule 24(1)(a) by attempting to move in the other direction, from the narrow question of superseding cause to other aspects of the proximate cause doctrine.

Moreover, the proximate cause issue was not properly presented below and is intensely factual. Petitioners object that "[t]he Court of Appeals at no point identified the risks the warrant requirement protects against" and that it "skipped that critical step." Pet. Br. 48. But Petitioners did not ask the Ninth Circuit to take that step. Moreover, the Court has recognized that "proximate causation ... involve[s] application of law to fact, which is left to the factfinder, subject to limited review." *Exxon*

Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 840-41 (1996). Yet Petitioners did not raise in the district court the proximate cause argument that they now seek to argue before this Court. Consistent with the Court's practice, it should limit its analysis to the superseding cause and excessive force issues addressed in Sections I and II above.

B. If The Court Addresses The Proximate Cause Issue, Petitioners' Proximate Cause Argument In Any Event Fails.

1. As the United States notes (U.S. Br. 27), proximate cause is typically explained "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). The Court in *Paroline* further explained that the proximate cause requirement serves "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.* Again, the focus on foreseeability is paramount. And here, as noted *supra* at 22-24, the district court *repeatedly* found that it was "foreseeable" that the actions of the deputies in entering the Mendezes' home without permission and without identifying themselves as police officers could lead to a violent confrontation.

2. Petitioners and the United States attempt to avoid those findings by asking the Court to impose on the remedies available for constitutional violations an unprecedented and far-reaching limitation. The only injuries that are "proximately caused" by the violation, they urge, are injuries

connected to the particular interest that the constitutional right was designed to protect. Pet. Br. 43-44; U.S. Br. 27-30. Thus, any other injuries that occurred would not be redressable even though those injuries were entirely foreseeable and even if the violation was devised to inflict a particular harm. This proposed rule of law is not limited to the Fourth Amendment; it would extend to any constitutional claim against state and local officials and also to *Bivens* actions against federal officials.

The cases cited by Petitioners provide no support for their proposed limitation:

- Citing *Carey v. Piphus*, 435 U.S. 247 (1978), Petitioners argue that plaintiffs "can recover *only* such damages as are tailored to the interests protected by the particular right in question." Pet. Br. 44 (emphasis added) (quoting *Carey*, 435 U.S. at 259). But the term "only" does not appear in *Carey*. Rather, *Carey* holds that in a § 1983 action, in addition to "common law tort ... damages," plaintiffs may need further relief where the common law remedy does not sufficiently vindicate the particular constitutional right involved. 435 U.S. at 258.

- Citing *Martinez v. California*, 444 U.S. 277 (1980), Petitioners claim that injuries outside the scope of the interests protected by a constitutional right are "too remote a consequence of ... officers' actions." Pet. Br. 44 (quoting *Martinez*, 444 U.S. at 285). But the Court in *Martinez* held that the

consequences complained of in that case were "too remote" from the official action only because they were unforeseeable and too distant in time. 444 U.S. at 285.

- Citing *Paroline*, 134 S. Ct. at 1719, Petitioners assert that plaintiffs must prove that being injured was within "the scope of the risk created by" the search, as if "scope of the risk" referred narrowly to certain specific "interests" protected by the warrant clause, not to any foreseeable harm. Pet. Br. 44. But the quoted passage in *Paroline* treats "scope of the risk" as synonymous with "foreseeability" (134 S. Ct. at 1719), the very traditional standard of proximate cause that Petitioners are trying to avoid.

Petitioners do not point to any instance in a century and a half of § 1983 litigation in which this Court or any other court has denied relief for foreseeable and proven injuries based on the asserted interest protected by the constitutional right at issue.

Nor should the Court do so here, because Petitioners' "interest" analysis ignores the breadth of the district court's liability finding and the appellate court's ruling affirming the judgment in Respondents' favor. As Petitioners note (Pet. Br. 11), the district court awarded only nominal damages based on Respondents' knock-and-announce claim and their warrantless entry claim. The award of substantial damages was instead premised on one of Respondents' "excessive force"

claims. Pet. App. 135a. The Ninth Circuit, in turn, "affirm[ed] the district court's conclusion that the deputies *are liable for the shooting* following their unconstitutional entry." Pet. App. 26a (emphasis added). Critical here, no one denies that gunshot wounds are within the scope of the risk created by such a shooting.

But even if the Court focuses on Petitioners' violation of the warrant clause, Petitioners' attempt to provide an exclusive list of the interests protected by that clause demonstrates the unworkability of this proposed limitation on remedies for constitutional violations. Petitioners insist that the warrant clause has only three purposes: protecting privacy, assuring that a detached magistrate assesses the justification for the search, and limiting the scope of the search. Pet. Br. 44-45. But those are not the only interests protected by the warrant clause. Critical here, a "warrant also assures the individual whose property is searched or seized of the *lawful authority* of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (internal quotation marks and citation omitted). This, in turn, would avoid "lawful resistance by bystanders or the target of his intrusion." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 625 (1999). In *Utah v. Strieff*, 136 S. Ct. 2056 (2016), this Court similarly recognized that "[b]ecause officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their

rights through tort suits or *self-help*." *Id.* at 2060-61 (emphasis added); *see also Wolf v. Colorado*, 338 U.S. 25, 30 n.1 (1949) ("One may also without liability use force to resist an unlawful search.") (citing cases), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).[16]

In other words, an *additional* purpose served by the warrant clause is to avoid serious confrontations because of uncertainty regarding the legal authority for a non-consensual search. Thus, contrary to Petitioners' colorful refrain (Pet. Br. 46), both the framers of the Fourth Amendment and the Congress that enacted § 1983 *would* assuredly have agreed that "[y]ou better get a search warrant, or else people will get hurt." This analysis not only demonstrates the infirmity of Petitioners' insistence that the warrant clause has nothing to do with avoiding physical injuries, but

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[16] The Court has recognized that "Section 1983 is a codification of § 1 of the Civil Rights Act of 1871" and intended by Congress to be "construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). In 1871, resistance to searches and seizures was not uncommon in the absence of proper notice. *See State v. Belk*, 76 N.C. 10, 14 (1877) ("[I]f the officer has no authority to make the arrest, or having the authority, is not known to be an officer and *does not in some way notify the party that he is an officer and has authority*, the party arrested may *lawfully resist* the arrest as if it were made by a private person.") (emphases added); *see generally* 1 Edward Hyde East, *A Treatise of the Pleas of the Crown*, ch. V, § 81, at 314-15 (Philadelphia, P. Byrne 1806) (recognizing that subject upon whom process is to be executed may resist arrest unless there is "due notice of the officer's business").

also demonstrates the complexity and impossibility of the task that courts would face if they attempted to fashion an exclusive list of the "interests" served by a constitutional provision.

3. Petitioners acknowledge that serious injuries may result if officers enter a house unannounced, but insist that this is an interest wholly and exclusively protected by the "knock and announce" doctrine. Pet. Br. 50. But there is no historical basis for connecting this interest solely to the "knock and announce" rule or for ignoring other constitutional provisions that address similar concerns. Nor did the Court so hold in *Hudson v. Michigan*, 547 U.S. 586, 594 (2006), cited by Petitioners on this point. Pet. Br. 50.

Moreover, there is no reason to distinguish between a knock-and-announce violation, on the one hand, and an unlawful entry violation, on the other. At bottom, searches and seizures may be challenged as unreasonable in their execution whether or not they are conducted pursuant to a warrant, permitted by an exception to the warrant requirement, conducted in compliance with the knock-and-announce rule, or justified at their inception by probable cause or reasonable suspicion. The Court recognized that legal principle in *Terry v. Ohio*, 392 U.S. 1, 28 (1968): "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Here, as noted *supra* at 44-46, the deputies' actions were objectively unreasonable under the circumstances. And it is wholly foreseeable—as the district court also found and the Ninth Circuit agreed—that such

a search can result in a violent confrontation. Moreover, "it is common for injuries to have multiple proximate causes." *Staub,* 562 U.S. at 420. The knock-and-announce violation is clearly not the *only* cause of Respondents' injuries.

Nor did the lower courts rely solely on the deputies' violation of the knock-and-announce rule, as Petitioners claim. Pet. Br. 38, 49. To the contrary, the district court expressly held that Petitioners "violated Mr. and Mrs. Mendez's right to be free from an unreasonable search in the absence of a proper knock-and-announce...." Pet. App. 122a. The court added:

> [T]he multiple indicia of residency—including being told that someone lived on the property—means that the conduct rose beyond even gross negligence. And it is inevitable that a *startling* armed intrusion into the bedroom of an innocent third party, with no warrant or *notice*, will incite an armed response.

Id. (emphases added). The critical point is that Petitioners failed to give *some sort of notice*—by knock-and-announce, identifying themselves as police officers, requesting consent, or otherwise. As the district court explained, "[i]f the Deputies had announced themselves, then this tragedy would never have occurred." *Id.* The Ninth Circuit expressly agreed: separate and apart from its knock-and-announce analysis, the court stated: "the situation in this case, where Mendez was holding a gun when the officers barged into the shack *unannounced*, was reasonably foreseeable."

Pet. App. 25a (emphasis added). That ruling, too, is not tied exclusively—or even "largely" (Pet. Br. 38)—to the knock-and-announce violation.

4. Lastly, Petitioners and the United States assert that the result in this case would have been the same if the deputies had obtained a search warrant and approached the Mendez home with a copy in their pockets. Pet. Br. 50-51; U.S. Br. 32. Thus, they reason, the unconstitutional search itself could not be a proximate cause of the shooting. This argument is unsound for at least two reasons. First, had Conley and Pederson recognized, as any competent officer would have, that they were required to obtain a warrant before entering the Mendezes' home, they would surely have decided to seek consent from the Mendezes rather than waiting for a warrant. *See* Dkt. 298 at 31 ("Waiting in order to get a warrant would have defeated the purpose of pursuing Mr. O'Dell...."). If Mr. or Mrs. Mendez had been asked to consent to the search, there would have been no shooting. Exh. 232-000080 ("I didn't know it was you guys."). Second, if the deputies had requested a warrant as Petitioners' hypothetical envisions, it would have taken time to obtain one, during which time Mr. and Mrs. Mendez (even if not alerted by a request to enter) would surely have left their home and noticed the deputies. After all, it was the middle of the day, the shack had no bathroom, and Mrs. Mendez was seven months pregnant. J.A. 88-92; Dkt. 298 at 97; Dkt. 301 at 161. In this scenario

too, if Petitioners had waited until they had a warrant, there would have been no shooting.[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 16, 2017

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[17] Moreover, whether the deputies could have obtained a warrant is and remains a disputed issue. Respondents cross-appealed on that point below, and the Ninth Circuit did not reach it. Pet. App. 2a, 11a n.5

RECORD
AND
BRIEFS

FILED
MAR 10 2017

No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION[1]

Plaintiffs bury the lede on page 42: The headline is that no one will support the Ninth Circuit's provocation rule. Recall that the Ninth Circuit announced one rule and applied another. The announced rule is: "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." Pet. App. 22a. And the rule the Ninth Circuit *applied* requires no actual provocation, just "that the deputies' unconstitutional conduct *created a situation which led to the shooting*." *Id.* (emphasis added).

Plaintiffs wholeheartedly defended the Ninth Circuit's rule in their Brief in Opposition (at 29), stating that the "Ninth Circuit's analysis is manifestly correct." But now, without warning, they decline any defense. The reason is that the Ninth Circuit's provocation rule is indefensible.

In its place, Plaintiffs offer a new "test," not suggested anywhere in their Brief in Opposition, which "differs from the Ninth Circuit's analysis," Resp. 43: "[I]n resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*,"

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[1] We abbreviate Brief for Petitioner "OB," Brief of Respondent "Resp.," Brief for the United States "U.S. Br.," and other amicus briefs as "___ Br.," according to the lead amicus's name or abbreviation.

which, they say, entails a "balancing test" entirely different from anything the Ninth Circuit considers. Resp. 42-43.

No court has ever adopted this test. It suffers from the same flaws as the Ninth Circuit's rule and layers in additional ones. It analyzes for "reasonableness" all police action, not just searches and seizures. This contradicts the Fourth Amendment itself, and conscripts judges and juries into the role of armchair quarterbacks second-guessing police tactics in the field.

By contrast, the test we endorse is the objective-reasonableness test this Court announced in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Plaintiffs and their amici respond not by critiquing our test but by attacking a straw-test that ignores the "totality of the circumstances" of a situation. That is not our test.

Plaintiffs' proximate cause argument fares no better. From the first page of their brief until almost the last, they insist that what proximately caused their injuries was the Deputies' failure to announce themselves before opening the shack door. But Plaintiffs never address the critical problem: The Court of Appeals held that the Deputies are entitled to qualified immunity on that claim.

So Plaintiffs try to link their injury to the Deputies' failure to secure a warrant before opening the shack's door. But the only way they can do that is by rejecting basic principles of proximate cause—including superseding cause—in favor of an expansive "foreseeability" test that considers only whether one could

have conceived of the possibility of a violent confrontation. A violent confrontation is foreseeable under that broad definition in almost any police intervention. That is never enough to establish liability, and certainly does not suffice here.

ARGUMENT

I. The Deputies' Use Of Force Was Constitutionally Reasonable.

Plaintiffs do not disagree that the Ninth Circuit's provocation rule should be rejected. In fact, neither they nor their amici defend that rule at all. Instead, Plaintiffs resort to criticizing a straw-test we did not propose—one that discards all context and myopically looks only at the "moment" "the bullet strik[es] Mr. and Mrs. Mendez." Resp. 35. But our test is simply this Court's *Graham* test, and Plaintiffs conceded below that the Deputies' use of force was reasonable under *Graham*. § I.A. Plaintiffs propose their own test that no court has adopted and that is even more problematic than the Ninth Circuit's provocation rule. § I.B. Even were this Court to accept Plaintiffs' rule, it must vacate the judgment below. § I.C.[2]

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[2] Plaintiffs organize their brief around the theory that the Court should decide the last Question Presented first, arguing that it is "wholly dispositive" and involves "nonconstitutional grounds." Resp. 18. But both issues are equally dispositive for Plaintiffs. And both involve constitutional issues: the standard for excessive force versus the availability of damages for officer force on a warrantless-entry claim. Moreover, the first Question considers the Ninth Circuit's provocation rule, which has been

A. This Court already set forth the correct analysis in *Graham*.

1. We do not advocate "a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished" or require courts to "pretend that critically important events leading to the use of force did not occur." Resp. 35. Nor does our proposed test ignore the "totality of the circumstances." Resp. 33-42. Rather, quoting verbatim from *Graham*, we explained that determining whether an officer's use of force was constitutional is an "objective" inquiry that pays "careful attention to the *facts and circumstances* of each particular case." OB21-22 (emphasis added).

Plaintiffs misunderstand what it means to say that reasonableness is evaluated as of "the moment" the force was used, "judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. An officer's perspective "includ[es] what the officer knew at the time." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Past events of which an officer knew or should have known inform whether the force used was reasonable when it was applied. *See Saucier v. Katz*, 533 U.S. 194, 207 (2001).

The relevant facts and circumstances naturally focus on the nature of the threat the officer confronted and how he responded to that threat. Here, the totality of the circumstances includes that officers were looking for a parolee-at-large whom they believed to

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"sharply questioned" but which this Court has not had an opportunity to review. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015).

be armed and dangerous. And they also "reasonably believed" that a man "holding [a] firearm rifle" pointed at them was "threaten[ing] their lives." Pet. App. 69a. Under that analysis, both courts below and Plaintiffs agreed that the Deputies' use of force was constitutionally reasonable. As the district court observed, "Mr. and Mrs. Mendez do not dispute that Deputies Conley and Pederson's use of deadly force—at the moment of shooting—was objectively []reasonable *under the totality of the circumstances*." Pet. App. 108a (emphasis added) (discussing JA230).[3] Plaintiffs cannot walk away from that concession now.

2. Yet, that is exactly what Plaintiffs try to do, by devising a new definition of "totality of the circumstances." They now claim this phrase overrides this Court's direction to assess reasonableness as of "the moment" force was used. *Graham*, 490 U.S. at 396. Instead, they claim, a use of force that was reasonable at that critical moment can be deemed unreasonable if a court concludes that the officers did something unreasonable in the events leading to the shooting.

But *Graham*'s focus on "the moment" force was used was integral to the Court's observation, in the same paragraph, that courts must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 396-97.

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[3] The district court inadvertently stated that Plaintiffs conceded the force was "unreasonable." Pet. App. 108a. Context and syntax show the court meant "reasonable."

Thus, as the United States explained, "consideration of the facts and circumstances leading up to a use of force in evaluating the reasonableness of that action is different from using a prior unreasonable decision to impose liability for a reasonable use of force" or "from blaming police for the need to use force at all." U.S. Br. 25-26. The reality is that we expect officers to enter situations that could quickly devolve into danger. Domestic disputes, for example, are particularly volatile and thus the need to use force is almost always foreseeable. The surest way to ensure that officers "do nothing" when we need them to use reasonable force is to let a jury scrutinize their every move for any hint of unreasonableness, with the benefit of 20/20 hindsight. *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994); *see* OB33-36.

3. Plaintiffs admit that this Court has never held that an officer's pre-seizure actions that led to a need to use force factor into the *Graham* analysis. Resp. 37. The best they can muster is to claim that *Scott*, *Plumhoff*, and *Brower* "suggest (without expressly holding) that an excessive force claim can properly be based on official action foreseeably creating a need for force." *Id.* Those cases "suggest" no such thing.

Scott v. Harris, 550 U.S. 372 (2007), did not "devote[] two paragraphs [at 384-85] to the reasonableness of the officer's pre-crash actions." Resp. 38. The Court did not evaluate those pre-crash actions at all. *Scott* discussed how to "weigh[] the perhaps lesser probability of injuring or killing numerous bystanders [by not stopping the suspect] against the perhaps larger probability of injuring or killing a single person [by ramming him off the road]." 550 U.S. at 384. It

was all about the risk-benefit calculation of the choice the police made at the moment of the seizure to "ram[] respondent off the road[]." *Id.* at 385.

Plumhoff v. Rickard addressed the district court's holding that officers could not rely on the "danger presented by a high-speed chase" because "that danger was caused by the officers[]." 134 S. Ct. 2012, 2021 n.3 (2014). Plaintiffs wrongly contend that this Court "rejected it as factually unpersuasive rather than as legally irrelevant." Resp. 38. *Plumhoff* said that the district court "relied on *reasoning* that is irreconcilable with our decision in *Scott*." 134 S. Ct. at 2021 n.3 (emphasis added).

Plaintiffs argue (at 38) that *Brower v. Cty. of Inyo* supports shifting the reasonableness inquiry to acts that occur before the seizure (there, a roadblock) because the Court's remand to consider reasonableness included whether officers "set[] up the roadblock in such manner as to be likely to kill." 489 U.S. 593, 599 (1989). The roadblock was the means by which the seizure was effected. Of course, the manner in which the roadblock was set up—including "the allegation that headlights were used to blind the oncoming driver"—would factor into reasonableness. *Id.*[4]

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[4] Similarly, Plaintiffs cite *Kentucky v. King*, 563 U.S. 452 (2011), to argue that "[i]n other contexts, the Court's Fourth Amendment analysis also encompasses preceding events." Resp. 39. That point has no force since we agree that the preceding events can inform the analysis insofar as they provide context for the officer's decisions. In any event, *King* involved a specific exception to the search-warrant requirement, which requires a different analysis than excessive-force claims.

4. Plaintiffs resort to farfetched hypotheticals to urge that faithful adherence to *Graham* would "bar redress in a troubling range of situations." Resp. 41. These hypotheticals reflect two faulty premises.

The first, discussed above (at 4-5), is that our rule "excludes all context and causes prior to the moment the seizure is finally accomplished." Resp. 35. Take the example of an "officer [who] jumped in front of a moving car and then shot the driver to stop the car." Resp. 41. Can the officer be held liable? It depends on context. If the driver is a known killer who was two blocks away when the officer stepped into the street and sped up aiming at the officer, then deadly force would be justified. If the officer was apprehending the driver for a traffic violation and jumped so close in front of the car that it is clear that the driver had no reasonable opportunity to avoid the officer and was not using the car as a weapon, deadly force would be unreasonable.

The difference is driven by *Graham*'s focus on whether the use of force was reasonable at the time, under the facts and circumstances reasonably known to the officer, balancing the individual's and government's interests, without second-guessing the officer with hindsight bias.

The second faulty premise is that excessive force is the only possible route for challenging police conduct. Take Plaintiffs' police-officers-as-midnight-burglars hypothetical. Resp. 41. The injured homeowner there does not need an excessive-force claim. She can sue on the ground that the failure to knock—unlike

here—was a violation of clearly established law and the direct cause of her injuries.

A common feature of Plaintiffs' hypotheticals is how removed they are from the practical realities of policing. The norm is not officers entering homes like common burglars or endangering everyone around them as an excuse to use deadly force. The norm is officers every day entering situations that could become dangerous. Nearly all uses of force "begin with the decision of a police officer to do something, to help, to arrest, to inquire." *Plakas*, 19 F.3d at 1150. That is what we pay them to do.

Practically every violent encounter can be dissected with the luxury of hindsight to find a tactic for a jury to second-guess. *Sheehan*, 135 S. Ct. at 1777 (quoting *Saucier*, 533 U.S. at 216 n.6 (Ginsburg, J., concurring)). The only rule that encourages an officer to make the right decision at that split-second moment of truth is one that assesses the reasonableness of the officer's conduct at that moment. Any other rule will force the officer either to make the wrong choice, with tragic consequences, or to do nothing and avoid the encounter entirely. OB33-36.

B. Plaintiffs' substitute test is wrong and should be rejected.

Plaintiffs abandon the Ninth Circuit's test underpinning the principal holding below with the dodge that "the details of the Ninth Circuit standard are not helpful in delineating the correct standard." Resp. 43. Instead, Plaintiffs (on page 42) unveil their test: "[I]n resolving excessive force claims, courts may entertain

a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*." No court has ever adopted that test, and for good reason. It is even more problematic than the Ninth Circuit's rule, suffering from the same three flaws and adding more.

1. Like the provocation rule, Plaintiffs' rule is contrary to the Fourth Amendment. OB28-36. It improperly transforms force that is otherwise objectively reasonable into force that is deemed objectively *un*reasonable. Under such a test, it does not matter that the officer acted in reasonable defense of his life and his partner's.

But Plaintiffs' rule is even worse. In opposing certiorari (at 6), Plaintiffs exalted "important limitations" the Ninth Circuit placed on its provocation rule, including requiring that the so-called "provocation" be "an independent Fourth Amendment violation." Plaintiffs strip away even that protection, requiring no constitutional violation at all—much less a clearly established one.

Moreover, Plaintiffs' test would have courts apply "the general [*Graham*] standard of reasonableness" to "police action" that occurred before the use of force. That is contrary to the Fourth Amendment, which "covers only 'searches and seizures.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Liability under Plaintiffs' test would be for a brand new tort: creating a dangerous situation. But the Fourth Amendment does not "prohibit[] creating unreasonably dangerous

circumstances" or bar "unreasonable, unjustified or outrageous conduct in general." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

Plaintiffs' own illustrations reveal just how unmoored their new tort is from the Fourth Amendment: They would impose categorical liability on officers for some tactical decisions, such as entering the house of a "deranged," "incoherent[]," "mentally ill man" after communication efforts failed, Resp. 41-42, but categorically rule out liability for others, such as "entering a room in which armed robbers are holding a hostage," Resp. 44. But each situation officers face is different—suppose the hostage taker and "deranged" man are one and the same—and courts are poorly positioned to determine the appropriate response after the fact. That is why "a Fourth Amendment violation [cannot be] based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Sheehan*, 135 S. Ct. at 1777.

2. By analyzing both the officer's predicate conduct and the seizure itself for general "reasonableness" and not violation of clearly established constitutional law, Plaintiffs' test guts qualified-immunity protections. OB36-40. Plaintiffs have never explained how liability for reasonable force may permissibly rest on an act or a tactic that violated no clearly established law. And, as demonstrated below (at 17-18), the main factor on which Plaintiffs base their assertion of unreasonableness is the failure to knock and announce a second time at the shack, which was *not* a clearly established violation.

3. Plaintiffs' rule still undermines proximate cause. In arguing otherwise, Plaintiffs emphasize that it was "foreseeable" that the Deputies' actions "could lead to a violent confrontation." Resp. 48. But proximate cause requires a direct relationship between the challenged conduct and the injury without a superseding cause. *See* OB43; Nat'l Ass'n of Counties Br. 16-17. Like the Ninth Circuit's provocation rule, Plaintiffs' proposed rule absolves a plaintiff of any obligation to prove that.

Plaintiffs' focus on foreseeability (especially as Plaintiffs define it, *see infra* 15-16) raises an even more serious problem: It is Plaintiffs (not us) who urge courts to "segment" the course of events, Resp. 33—in a far more troubling manner. Plaintiffs' proposed test looks only at an officer's pre-seizure conduct and asks whether "that police action foreseeably created the need for the use of force" in a way that a jury later considers unreasonable. Resp. 42. If the answer is yes, it is irrelevant what happened in the segment of time when the seizure occurred. Under Plaintiffs' test, it does not factor into the analysis that the Deputies confronted a man whom they reasonably perceived to be pointing a gun at them, and that they used force based on what everyone agrees was reasonable fear for their lives. Resp. 44-46.

C. Even if this Court accepts Plaintiffs' test, it must vacate the judgment.

Even if this Court were to adopt Plaintiffs' test, it must at least vacate the judgment below. That is not the test the district court applied. Nowhere in its provocation analysis did the district court "careful[ly]

balance[e] ... the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," which Plaintiffs call for. Resp. 42-43 (quoting *Graham*, 490 U.S. at 396).

In fact, under Plaintiffs' test, this Court should reverse outright, because no reasonable factfinder could rule for Plaintiffs. Plaintiffs themselves ignore the "governmental interest" that is supposed to anchor the inquiry. Resp. 44. They do not even mention the governmental interest in ensuring that the Deputies act on their reasonable belief that their lives were in jeopardy when they confronted a man with what appeared to be a rifle. That alone justified the use of lethal force. *See* OB22-23.[5]

Next, Plaintiffs claim that the "intrusion on the Mendezes' Fourth Amendment rights was profound" because of the warrantless search. Resp. 45. But that conflates the search and the seizure. The § 1983 analysis must "begin[] by identifying the specific constitutional right allegedly infringed." *Graham*, 490 U.S. at 394. By seeking to hold the Deputies liable, not for

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[5] Plaintiffs also rely on numerous factual assertions that are contradicted by the district court's findings. Plaintiffs suggest that Mr. Mendez did not "point" the BB gun towards the Deputies, Resp. 13 n.8; that the Deputies "had [no] information that the parolee [O'Dell] was armed or dangerous," Resp. 44-45; and that the Deputies "lacked any credible information that [O'Dell] was in Plaintiffs' shack," *id.* But the district court found that Mr. Mendez "pointed" the BB gun "towards Deputy Conley," Pet. App. 69a; that the Deputies "believed [O'Dell] to be armed and dangerous," Pet. App. 65a; and that the Deputies "had probable cause to search for Mr. O'Dell inside the shack," Pet. App. 93a.

their reasonable use of force, but for other acts undertaken prior to the shooting, Plaintiffs' analysis contravenes this Court's settled analysis. *See* Nat'l Ass'n of Counties Br. 11-13.

Finally, Plaintiffs turn to the "balance of culpability," Resp. 46, an issue they claim comes from *Scott*, Resp. 43. But *Scott* considered something altogether different: the culpability of the suspect whose life would be at risk if the officer chose to ram his car versus that of *innocent bystanders* whose lives would be risked if the suspect continued to drive dangerously. *Supra* 6-7.

In any event, as Plaintiffs emphasize (at 34, 44-45), the situation must be viewed "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. What the Deputies reasonably perceived was a man pointing a gun at them. OB8-9. From that perspective, the bearer of the gun was highly culpable, even if that is not what he meant to do. Officers do not "violate[] the Constitution" when they "us[e] ... force" based on "reasonable, but mistaken, beliefs," especially the belief that someone is threateningly pointing a lethal weapon at point-blank range. *Saucier*, 533 U.S. at 205-06.

II. The Warrantless Entry Was Not A Proximate Cause Of Plaintiffs' Injuries.

Plaintiffs concede that both proximate cause and superseding cause revolve around principles of foreseeability. Resp. 21, 51. Yet, as to both, Plaintiffs apply a threshold of foreseeability that is inconsistent with this Court's precedents and basic tort principles.

§ II.A. When they do purport to apply principles this Court has prescribed—including scope of risk—Plaintiffs focus on the risk arising from the wrong violation and mischaracterize the risk arising from the right violation. § II.B. Plaintiffs' analysis of superseding cause shares this same flaw, but is compounded by adding an improper prerequisite of culpability. § II.C.

A. Plaintiffs' definition of foreseeability is improperly expansive.

As we explained (OB43-44), this Court has held that an officer who violated a clearly established constitutional right can be held liable only for an injury within the scope "protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). At points, Plaintiffs concede that "foreseeable" means within "the scope of the risk," Resp. 51 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014)), and that the terms are "synonymous," Resp. 53. Plaintiffs nevertheless maintain that their harms are compensable even if not "connected to the particular interest that the constitutional right was designed to protect." Resp. 51-52. Worse, in place of this basic principle, Plaintiffs propound a new theory of § 1983 liability that treats harm as "foreseeable" so long as an officer's action "*could* lead to a violent confrontation." Resp. 19 (emphasis added).

This conception of "foreseeability" is wrong. Under basic common-law principles of proximate cause and superseding cause, a harm is not "foreseeable" simply because it is a *conceivable* consequence of an action. Rather, it must be "the *natural* and *probable*

consequence." *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (emphasis added). "Foreseeability ... [is] a shorthand expression intended to say that the scope of the defendant's liability is determined by the scope of the risk he [tortiously] created." D. Dobbs et al., *The Law of Torts* § 205 (2d ed. 2016); D. Dobbs et al., *Prosser & Keeton on Torts*, § 43, 281 (5th ed. 1984). This risk-focused formulation is the "preferable" approach to discerning whether an injury is foreseeable. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 29 cmt. e.

This Court has explicitly embraced the fundamental tort principle that a harm is not "foreseeable" unless it falls within the "scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719. This Court could not have been clearer about this in *Carey*. *Carey* examined "the elements and prerequisites for recovery of damages" under § 1983, and concluded that, "to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." 435 U.S. at 257-59, 264-65.

Despite this clear direction, Plaintiffs insist that *Carey* endorsed free-flowing liability untethered from the risk associated with the constitutional violation. They cite (at 52) the remark in *Carey* that, "[i]n some cases," § 1983 damages might be greater than those recoverable under "common-law tort rules." *Id.* at 258. But that just meant that § 1983 damages mirror common-law tort damages *unless* "the interests protected by a particular constitutional right [are] not

also ... protected by an analogous branch of the common law torts." *Id.* That passage did not detract from the explicit direction that the focus must be on the interests the constitutional right is "meant to protect," i.e., the "purpose" of the constitutional protection in question. *Id.* at 259, 262.

B. Injuries from the shooting were not within the scope of risk of the only relevant constitutional violation—the Deputies' warrantless entry.

1. When Plaintiffs turn to applying the correct scope-of-risk analysis, they erroneously apply it to the wrong conduct. At one point, Plaintiffs argue "that gunshot wounds are within the scope of the risk created by ... a shooting." Resp. 54. But the Ninth Circuit's *alternative* holding is premised on the assumption that the Deputies *cannot* be held liable for their reasonable use of force. Pet. App. 24a. The question is whether their injuries can be traced to a *different* act that *was* a constitutional violation.

There is only one violation that Plaintiffs could even try to link to their injuries: the failure to seek a warrant, because that is the only conduct for which the Deputies are not immune. Yet, Plaintiffs focus almost entirely on a *different* violation—the failure to knock and announce. On over 15 different pages Plaintiffs invoke the failure to "knock-and-announce," the Deputies' "barging" in "unannounced," "unidentified," "without warning" or "notice," and "startling" the Mendezes. *E.g.*, Resp. 1, 17, 19, 20, 22, 23, 24, 25,

28, 30, 36, 37, 46, 48, 49, 51, 57. That is impermissible, because the officers are immune from liability for that violation. Pet. App. 20a.

Plaintiffs argue that their reliance on "unannounced" is appropriate because the warrant and the knock-and-announce requirements protect the same constitutional interests and so there is "no reason to distinguish between [them]." Resp. 56. As we will demonstrate momentarily, this Court has said the opposite. So Plaintiffs must demonstrate that the injuries they suffered are within the scope of risk of a warrantless entry.

For similar reasons, Plaintiffs make no headway by asserting that the courts below found that the warrantless entry alone "'could lead to a violent confrontation.'" Resp. 23 (quoting Pet. App. 126a); *accord* Resp. 57-58. They held no such thing. The full sentence Plaintiffs partially quote from the district court actually says: "In this case, it was foreseeable that opening the door to the shack without a warrant (or warrant exception) *and without knocking-and-announcing* could lead to violent confrontation." Pet. App. 122a. Moreover, Plaintiffs never explain how the district court could have awarded only $1 in nominal damages if, as they maintain, it believed that the failure to secure a warrant caused the shooting. OB47. The Court of Appeals similarly relied on "the officers *barg[ing]* into the shack *unannounced*" as the proximate cause of shooting. Pet. App. 25a (emphasis added); *see* Pet. App. 21a-22a.

2. When the focus is appropriately cabined to the failure to secure a warrant, Plaintiffs' claim fails precisely because "[t]he interests protected by the knock-and-announce requirement are quite different" from the interests protected by the warrant requirement. *Hudson v. Michigan*, 547 U.S. 586, 593 (2006). The knock-and-announce requirement "protect[s] ... life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* at 594. That risk of injury has "nothing to do with whether the Fourth Amendment require[s] the officers to obtain a warrant." *United States v. Smith*, 526 F.3d 306, 311 (6th Cir. 2008).

Our opening brief identified the primarily privacy-based interests protected by the warrant requirement. OB44-45 (collecting authorities). Protecting "life and limb" of a resident "surprised" by an "unannounced entry" are not among them. Plaintiffs argue that the warrant requirement has "an *additional* purpose": "'assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" Resp. 54 (quoting *Groh v. Ramirez*, 540 U.S. 551, 561 (2004)).

This Court has already rejected any linkage between the warrant requirement and preventing confrontations. That "argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting [the] search" when, in fact, there is no "such ... requirement." *United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) (citation omitted). The warrant requirement "does not protect an interest in monitoring searches"

or give a property owner "license to engage the police in a debate over the basis for the warrant." *Id.* at 99. This case illustrates the point. The result here would have been no different if the Deputies had a warrant in their pocket or had obtained a phone warrant just before entering the shack.

Nor do Plaintiffs' other authorities alter the analysis. Plaintiffs contend that the common law permitted citizens to use "self-help" to resist an unlawful search or seizure. Resp. 55. But those sources do not support the further proposition that the *purpose* of the *warrant requirement* is to avoid violent confrontation.

Finally, Plaintiffs suggest that the result *might* have been different if the Deputies had gotten a warrant because Plaintiffs might have left to find a bathroom or the Deputies might have knocked and announced if they had a warrant. Resp. 58. Both hypotheticals (the bathroom hypothetical, in particular) are quintessential examples of events that are outside the scope of the purpose of the right at issue. Those arguments also highlight precisely what the proximate cause requirement is designed to prevent: "intricate, uncertain," and "speculative" inquiries into what might have happened in a hypothetical chain of events. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006).

3. Plaintiffs argue that none of this matters because proximate cause is not before this Court—only superseding cause. That argument is irrelevant and wrong.

It is irrelevant because the foreseeability principle is central to both proximate cause and superseding cause (as Plaintiffs concede, Resp. 21, 51) and the same scope-of-risk analysis applies to both, Resp. 51, 53. As the Restatement explains, "determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from [the prohibited] conduct." Restatement (Second) of Torts § 281 cmt. h. The rules for proximate and superseding cause are "functionally the same." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 cmt. a.

In any event, Plaintiffs are wrong. The Ninth Circuit's ruling had two alternative holdings, and our Petition clearly challenged both of them. As we explained, the third Question Presented challenged "[t]he Ninth Circuit's decision indicating [that] Defendants can be held liable for the shooting based upon proximate causation stemming from the predicate conduct of the earlier, unlawful entry." Pet. 34. We urged the Court to grant certiorari to consider "[w]hether damages stemming from a reasonable use of force were proximately caused by a prior, unlawful entry." Pet. 15; *accord* Pet. 16, 33-34. Our reply similarly emphasized that the warrantless entry did not proximately cause Plaintiffs' injuries. Cert. Reply 9-10. It is not appropriate to read the third Question Presented as limiting these expansive arguments.

Plaintiffs certainly did not read it that way. They explicitly recognized the wider scope that the Petition

plainly contemplates by rendering two Questions Presented as asking "[w]hether the Ninth Circuit's *proximate cause* analysis conflicts with decisions of this Court or other circuits," and "[w]hether the Ninth Cicuit correctly affirmed the district court's finding that the deputies' unlawful conduct *proximately caused* [Plaintiffs'] injuries." Brief in Opp. i (emphasis added). Far from suggesting they understood the Petition as limiting review to superseding cause, Plaintiffs argued, under the heading, "BASIC NOTIONS OF PROXIMATE CAUSE," that their injuries were "a direct consequence of Petitioners' unlawful actions ... under basic notions of proximate cause." *Id.* at 20, 22-23.

C. Mr. Mendez's pointing a gun at the Deputies was a superseding cause.

While the foregoing argument on foreseeability applies equally to both the proximate-cause analysis and superseding cause, Plaintiffs make another error specific to superseding cause. The parties agree that a superseding cause cuts off the proximate-causal chain. Resp. 20; OB51-53. But Plaintiffs incorrectly argue that an act can be a superseding cause only if it was both not "foreseeable" and "highly culpable." Resp. 21-22, 24 (quotation marks omitted). Plaintiffs misapply the first prong and are wrong about the second.

1. The flaws in Plaintiffs' view of "foreseeability" addressed above (at 15-16) are particularly problematic with regard to superseding cause. Plaintiffs argue that a suspect's threat of deadly force against an of-

ficer is not an "unforeseeable" superseding cause unless the suspect "know[s] or ha[s] reason to know that they were officers." Resp. 26. But, as Plaintiffs repeatedly emphasize (at 34, 43, 45), reasonableness of an officer's action is adjudged from the perspective of a reasonable officer on the scene. *See supra* 4. From the Deputies' perspective, they were engaged in a police investigation in broad daylight in uniforms identifying them as officers when they encountered a man pointing a gun at them. They had every reason to expect he would believe they were officers. Because it is "not ordinarily reasonable to foresee" that a person will attack a uniformed officer, *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007), a person pointing a gun at a uniformed officer conducting a search is a superseding event regardless of what that person perceives.

2. Plaintiffs are also wrong that Mr. Mendez's pointing a gun at the Deputies cannot be a superseding cause because he was not "culpable." Resp. 21, 24-25. First, there is no such culpability requirement. A "superseding cause ... may be tortious or entirely innocent." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 34 cmt b. Whether a person's conduct is "culpable" in the lay sense may be a *factor* in determining whether that conduct was a superseding cause, *see* U.S. Br. 28; Restatement (Second) of Torts § 442, but it is not a prerequisite, as Plaintiffs suggest.

Even if there were a culpability requirement, for the reasons discussed (at 22), it could not focus on whether Mr. Mendez knew the Deputies were officers or whether he intentionally threatened them. *E.g.*,

Resp. 28-30. Here, again, the inquiry considers only the Deputies' perspective. Whether or not it was permissible for the Deputies to open the shack's door in broad daylight, no uniformed officer in their position would perceive the threat they confronted to be anything other than culpable.

That does not mean that "a homeowner has only himself or herself to blame, and no legal recourse whatsoever, if he or she picks up a firearm ... to fend off an unidentified and unlawful intruder ... and is then shot by an unidentified police officer." Resp. 25. As indicated above, if an officer breaks in like a common burglar such that any reasonable officer would know that he would not be perceived as an officer, there could be recourse. Same in any other context where the officer's failure to identify himself was a violation of clearly established law. But not in this unique circumstance where the shooting was the result of a tragic confluence of reasonable misperceptions on both sides and where the officers' failure to identify themselves cannot be the basis for liability.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

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Date: March 10, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 24 2017
OFFICE OF THE CLERK

No. 16-369

In the Supreme Court of the United States

LOS ANGELES COUNTY, CALIFORNIA, ET AL.,
PETITIONERS

v.

ANGEL MENDEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly imposed damages liability for a police use of force that was constitutionally reasonable at the moment that it occurred, on the theory that the police provoked the situation that led to the use of force.

2. Whether the Ninth Circuit correctly concluded that the police officers' warrantless entry into a home proximately caused respondents' injuries from a later police use of force.

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In the Supreme Court of the United States

No. 16-369

LOS ANGELES COUNTY, CALIFORNIA, ET AL.,
PETITIONERS

v.

ANGEL MENDEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents questions about whether law enforcement officers who shot a man pointing a gun at them may be liable for damages from the shooting under 42 U.S.C. 1983—not because the officers' use of force was excessive, but because the officers violated clearly established law by entering the man's home without a warrant. The Fourth Amendment applies to both state and federal law enforcement officers, and the qualified immunity principles applicable under Section 1983 also apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Further, the United States prosecutes excessive-force cases under 18 U.S.C. 242. The United States there-

fore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. On October 1, 2010, police officers in Los Angeles were searching a neighborhood for Ronnie O'Dell, a wanted parolee. Pet. App. 3a, 56a. O'Dell was a felony suspect classified as armed and dangerous, and the police had a warrant for his arrest. *Id.* at 3a, 57a; J.A. 74. O'Dell had previously evaded officers' attempts to arrest him. Pet. App. 57a.

The police received a tip that O'Dell had been spotted in front of a home belonging to Paula Hughes. Pet. App. 4a. Officers met to develop a plan before proceeding to the house. *Ibid.* They decided that some of them would approach the front door of the house and attempt to speak with Hughes, while others would go to the backyard to cover the back door and conduct a security sweep. *Id.* at 4a, 59a. Deputy Christopher Conley and Deputy Jennifer Pederson (petitioners in this Court) were assigned to the back of the house. *Id.* at 4a. At the briefing, officers were told that a man and woman stayed in a shed in the backyard. *Id.* at 4a, 59a-60a; J.A. 110, 212. Only Deputy Pederson (and not Deputy Conley) heard this announcement. Pet. App. 59a; J.A. 173.

The police arrived at the Hughes residence, and Deputy Conley and Deputy Pederson went to the backyard. Pet. App. 4a. The backyard was filled with refuse and debris, including abandoned automobiles and other equipment. *Id.* at 60a; J.A. 78-79, 81-83. It also contained three metal storage sheds and a plywood shack. Pet. App. 60a.

Deputy Conley and Deputy Pederson entered the backyard with their guns drawn because they believed

O'Dell to be armed and dangerous. Pet. App. 65a. They checked the three metal storage sheds for O'Dell and did not find him. *Ibid.* The officers then approached the shack. *Id.* at 66a. The shack was 7 feet by 7 feet by 7 feet and was covered by a blue tarp. *Id.* at 5a, 61a. It had a single entrance (without a lock) and no windows, and there was a storage locker in front of it and debris all around it. *Ibid.*; J.A. 82, 87, 102. There was an air conditioner on the side of the shack, but the officers could not see it from where they were standing. Pet. App. 62a, 66a; J.A. 81, 216. The officers "did not perceive the shack to be a habitable structure," but they thought O'Dell might be hiding in it. Pet. App. 66a-67a; J.A. 175-176, 215-216.

Deputy Conley opened the door to the shack, with Deputy Pederson behind him. Pet. App. 5a; J.A. 177. Deputy Conley pushed back a blue blanket hanging from the top of the door frame. Pet. App. 5a, 67a. As he did so, the officers saw the silhouette of an adult man holding a gun. *Id.* at 67a. The gun "closely resembled a small caliber rifle," and it was pointed towards the officers. *Id.* at 62a, 69a.

"Almost immediately" Deputy Conley yelled, "Gun!" Pet. App. 69a. The officers, "fearing that they would be shot and killed," fired their weapons at the man while backing out of the shack. *Id.* at 69a-70a. The officers' shots hit the man, respondent Angel Mendez, and his girlfriend, respondent Jennifer Garcia, who was behind him in the shack. *Id.* at 70a. Mendez and Garcia were severely injured. *Ibid.*

The shooting was a tragic mistake. Mendez and Garcia had been living in the shack and were napping at the time of the entry; Mendez had picked up the gun to move it, not to shoot at the officers; and the

gun was a BB gun, not a small caliber rifle. Pet. App. 5a-6a, 67a-68a.

2. Respondents sued Los Angeles County, Deputy Conley, and Deputy Pederson in federal court under 42 U.S.C. 1983, alleging that the officers violated their Fourth Amendment rights. Pet. App. 6a, 72a. Following a bench trial, the district court denied qualified immunity, found the officers personally liable for Fourth Amendment violations, and awarded over $4 million in damages. *Id.* at 55a-136a.

The district court first concluded that, although the officers had probable cause to search the shack, they violated clearly established law in entering the shack without a warrant and without knocking and announcing their presence. Pet. App. 66a, 78a-105a. Although the officers both testified that they believed the shack to be uninhabitable, *id.* at 66a; J.A. 175-176, 215-216, the court thought they should have realized "that the shack was a separate residence being used by third parties" and therefore should have treated it as a "separate residential unit" for Fourth Amendment purposes, Pet. App. 85a, 102a. The court awarded only nominal damages for the officers' unlawful entry into the shack. *Id.* at 135a.

The district court then considered whether the police violated clearly established Fourth Amendment law in shooting respondents. Pet. App. 106a-127a. The court first determined that, "at the moment of shooting," the officers' use of deadly force was justified. *Id.* at 108a. The court explained that "Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." *Ibid.*

The district court nevertheless found the officers liable for the shooting based on the Ninth Circuit's "provocation" doctrine. Pet. App. 109a-127a (relying on *Billington* v. *Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)). The court reasoned that the officers "'provoked' Mr. Mendez's response" by entering the shack without obtaining a warrant or knocking and announcing their presence. *Id.* at 109a, 112a, 118a. The court also concluded that liability was appropriate because it was "foreseeable" that the officers' unlawful entry into the shack "could lead to a violent confrontation." *Id.* at 124a-126a. The provocation theory was the sole basis for the $4 million damages award. *Id.* at 135a-136a.

3. The court of appeals affirmed in pertinent part. Pet. App. 1a-26a. The court first determined that the officers' entry into the shack violated clearly established law—but only because the officers entered the shack without a warrant, and not because they failed to knock and announce their presence at the time of entry. *Id.* at 18a, 20a. The court then found the officers liable for damages from the shooting using the circuit's "provocation" doctrine. *Id.* at 22a. The court did not question the district court's holding that "the deputies' shooting of [respondents] was not excessive force under *Graham v. Connor*, 490 U.S. 386 (1989)." *Ibid.* Instead, the court found the officers liable for respondents' injuries from the shooting because the officers' entry into the shack "created a situation which led to the shooting and required the officers to use force." *Ibid.* (quoting *Espinosa* v. *City & Cnty. of S.F.*, 598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012)).

In the alternative, the court held that the officers "are liable for the shooting under basic notions of proximate cause" because "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." Pet. App. 24a-25a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding the officers liable for damages based on a police shooting that was reasonable at the moment it occurred. Neither the court's provocation theory nor its proximate-cause analysis justifies the personal liability it imposed.

I. The first question in this case is whether the Ninth Circuit correctly imposed personal liability on the view that the officers used excessive force, in violation of clearly established Fourth Amendment law, because they created the situation that led to the shooting. A claim of excessive force is properly analyzed under *Graham* v. *Connor*, 490 U.S. 386 (1989), and the qualified immunity doctrine protects officers against damages liability for Fourth Amendment violations unless the unlawfulness of the officers' actions is beyond debate. In this case, all agree that the officers' use of force was justified under *Graham* because the officers reasonably feared for their lives when Mendez pointed a gun at them. That should have been the end of the matter with respect to the question whether the shooting was constitutional.

Instead, the courts below found the officers personally liable under the Ninth Circuit's "provocation" doctrine. Under that doctrine, a reasonable use of force is deemed unreasonable because the police "created [the] situation" that led to the shooting. Pet. App. 22a (quoting *Espinosa* v. *City & Cnty. of S.F.*,

598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012)). That doctrine is wrong. Under *Graham*, a reasonable use of force does not become excessive because of a constitutional violation in the events leading up to the encounter. And such an open-ended inquiry skews incentives for the police, creates uncertainty, and erodes qualified immunity. This Court should reject it.

II. The second question is whether the Ninth Circuit correctly held that the officers' warrantless entry into the shack proximately caused respondents' injuries from the shooting. Tort-law causation principles apply in cases under 42 U.S.C. 1983. Under those principles, officers may in certain circumstances be held liable for damages that proximately resulted from constitutional violations so long as no superseding cause cuts off liability. The question whether a police action proximately caused certain damages depends on, *inter alia*, whether the damages were reasonably foreseeable and within the scope of the risk of the initial action.

The Ninth Circuit erred in holding that the warrantless entry here (which it concluded was unlawful) proximately caused the damages from the shooting. Without the provocation theory, the only potential violation of respondents' constitutional rights (which had to not only be a violation, but a clearly established violation) was the officers' entry into the shack without a warrant. But as the court of appeals recognized, the proximate cause of the shooting was the officers' failure to knock and announce their presence, Pet. App. 22a—not the lack of a warrant. Because the officers were entitled to qualified immunity for that failure to knock and announce, *id.* at 18a, they cannot be held personally liable for the injuries caused by it.

The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN IMPOSING LIABILITY AND DAMAGES FOR THE OFFICERS' SHOOTING ON A "PROVOCATION" THEORY

A. The Fourth Amendment Excessive-Force Claim Should Be Analyzed Under *Graham* v. *Connor* Through The Lens Of Qualified Immunity

1. A claim that the police used excessive force during an investigation or arrest is properly analyzed as a claim for violation of the Fourth Amendment's prohibition on unreasonable seizures. See *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 7-8 (1985). The Fourth Amendment question is whether the officer acted reasonably in using the force. *Graham*, 490 U.S. at 396. The reasonableness inquiry is an objective one; it does not depend on the officer's "underlying intent and motivation." *Id.* at 397; see, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 736 (2011).

The reasonableness of a use of force depends on "the facts and circumstances of each particular case," including the severity of the crime at issue, whether the suspect is actively resisting arrest or attempting to flee, and, most importantly, "whether the suspect poses an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. Reasonableness is judged "at the moment" force is used, and from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.*

In applying the reasonableness standard, courts must provide "allowance for the fact that police offic-

ers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. The Court has warned that, in determining what is reasonable, "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn* v. *Huff*, 132 S. Ct. 987, 991-992 (2012) (per curiam).

2. The Fourth Amendment excessive-force question here arises in the context of a lawsuit against state officers under 42 U.S.C. 1983, where the qualified immunity doctrine applies. See *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661-1662 (2012). Qualified immunity shields officers from suit unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine ensures that "fear of liability will not unduly inhibit officials in the discharge of their duties." *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011) (citation and internal quotation marks omitted).

Law is "clearly established" when it is so clear that "every reasonable official would [have understood] that what he is doing violates that right." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (citations and internal quotation marks omitted; brackets in original). The clearly established law must be "particularized to the facts of the case," so that the legal question before the officers was "beyond debate." *White* v. *Pauly*, No. 16-67 (Jan. 9, 2017), slip op. 4, 6 (per curiam) (citations and internal quotation marks omitted). And "[t]he inquiries for qualified immunity and exces-

sive force remain distinct." *Saucier* v. *Katz*, 533 U.S. 194, 204 (2001). Thus, in this case, even if the officers acted unreasonably in shooting respondents (and they did not), they are still shielded from personal liability unless existing law made clear, through cases with facts sufficiently close to these, that it was "beyond debate" that the officers could not use force to respond to the apparent threat they faced in the shack.

B. Under *Graham*, The Officers Here Did Not Violate The Fourth Amendment

The officers' use of force in this case was reasonable under the circumstances, and it therefore was constitutional under the Fourth Amendment.

The "crucial question" is whether Deputy Conley and Deputy Pederson "acted reasonably in the particular circumstances that [they] faced." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014). Here are the circumstances: Deputy Conley and Deputy Pederson had been looking for a wanted parolee. Pet. App. 57a. They had probable cause to believe he was in Hughes's backyard, and they thought he might be in one of the storage sheds or in the shack. *Id.* at 66a-67a, 93a. The officers had their guns drawn because they "believed [O'Dell] to be armed and dangerous." *Id.* at 65a. After checking the storage sheds and not finding O'Dell, the officers approached the shack. *Id.* at 65a-67a. As Deputy Conley opened the door to the shack and pulled back the curtain, he was confronted by a man pointing a gun at him. J.A. 99. The gun was "approximately a foot or two feet away from [Deputy Conley's] face." J.A. 103. In that moment, the officers both believed that they were going to be killed. See J.A. 179 (Deputy Conley: "I thought to myself, This is where I'm going to die."); J.A. 217 (Deputy

Pederson: The man in the shack "w[as] going to shoot us, and possibly kill one or both of us.").

The officers' decision to use deadly force to neutralize a perceived threat to their lives was objectively reasonable. When Deputy Conley opened the door of the shack and saw a man with a gun, the officers "*reasonably* believed" that Mendez "threatened their lives." Pet. App. 69a. "Deputies Conley and Pederson's use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives." *Id.* at 108a. Although the officers' use of force risked significant injuries to respondents, that injury was counterbalanced by the officers' interest in preserving their own lives. See *Garner*, 471 U.S. at 11 (police may use deadly force when they face "a threat of serious physical harm").

The officers' mistaken belief about the type of gun pointed at them does not make their split-second decision to use force unreasonable. Although the gun turned out to be a BB gun, the officers' belief that it was a loaded weapon was reasonable because "[t]he BB gun rifle closely resembled a small caliber rifle." Pet. App. 62a; see *id.* at 69a ("Deputies Conley and Pederson *reasonably* believed that the BB gun was a firearm rifle."). Further, the officers did not act unreasonably in shooting rather than using a verbal warning. Although the Fourth Amendment does not require officers to use the least intrusive alternative, see *Wilkinson* v. *Torres*, 610 F.3d 546, 551 (9th Cir. 2010), cert. denied, 562 U.S. 1219 (2011), here the officers reasonably believed that they had no less intrusive option available because of the immediacy of the threat, J.A. 179-180.

Accordingly, the officers did not violate the Fourth Amendment in shooting respondents, let alone commit the type of clearly established constitutional violation that could justify personal liability. Indeed, everyone in this case recognized that there could be no liability under a straightforward application of *Graham*. The district court so found, Pet. App. 69a, 108a, and the court of appeals did not disagree, *id.* at 22a, 25a. Respondents themselves have conceded that the use of force was reasonable under *Graham*. *Id.* at 108a. "If the only issue in the case was simply what occurred at the moment of the shooting, then the verdict would have been in favor of the defendants." J.A. 237.

C. The Ninth Circuit Decided This Case Based On Its Provocation Doctrine, In Which A Reasonable Use Of Force Is Deemed Unreasonable Because Of A Prior Constitutional Violation

1. Although the officers' use of force was reasonable and therefore constitutional at the moment it occurred, the courts below deemed it unreasonable and unconstitutional based on the Ninth Circuit's "provocation" doctrine. Pet. App. 22a-25a, 109a-122a. That doctrine holds officers liable under the Fourth Amendment for a reasonable use of force when the court believes that the officers "created [the] situation" that "required the officers to use force." *Espinosa* v. *City & Cnty. of S.F.*, 598 F.3d 528, 539 (9th Cir. 2010), cert. denied, 132 S. Ct. 1089 (2012). Although the precise contours of the doctrine are somewhat unclear (see pp. 23-24, *infra*), what is clear is its effect: it holds officers liable under the Fourth Amendment for using excessive force even though the use of force was objectively reasonable at the moment it was employed. As the Ninth Circuit put it, an officer's "provocation"

of a situation that requires use of police force "render[s] the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." *Billington* v. *Smith*, 292 F.3d 1177, 1190-1191 (2002).

2. The "provocation" doctrine originated in *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 513 U.S. 1083 (1995). In that case, the police shot a man in his house while executing an administrative warrant. The man came to the City's attention because sewage was seeping from his house onto the street, a foul odor was coming from the house, and the backyard was filled with trash. *Id.* at 1357. Over the course of a month, the City attempted to contact the man: Health Department officials went to the house and knocked on the door; the City sent letters and summoned him to nuisance abatement hearings; and the Health Department obtained an administrative warrant to enter the home, which it mailed to him. *Ibid.* No one responded. *Id.* at 1357-1358. The City obtained a second administrative warrant, one that specifically authorized "forcible entry." *Id.* at 1358. When public health officials went to execute the warrant, they brought the police because they had learned that the occupant was mentally unstable. *Ibid.* They arrived at the house, and the occupant called out to them, "I'm going to get my gun and use it." *Ibid.* City officials, including a hostage negotiator, tried to talk with the man for about an hour; after that failed, a tactical team forced entry into the home. *Ibid.* The man inside pointed a gun at them. *Ibid.* The police ordered him to put the gun down; instead, he said, "I told you I was going to use it," and pulled the trigger. *Ibid.* The officers shot back, killing the man. *Ibid.*

The Ninth Circuit held the police officers could be liable for using excessive force—not because the police acted unreasonably in shooting the man when he pointed a gun at them, but because they "creat[ed] the situation which caused [the man] to take the actions he did." *Alexander*, 29 F.3d at 1366. The court's theory of liability turned on "the force the officers used in entering the house, not the force they used or didn't use once they had entered." *Id.* at 1366 n.12. In the court's view, if the purpose of the entry was to assist in an inspection, then the jury could find that use of a tactical team in the initial entry was excessive and could hold the police liable for the later shooting under *Graham*. *Id.* at 1366-1367.

3. After a series of cases in which the Ninth Circuit attempted to define the contours of the provocation doctrine, the court summarized the doctrine in *Billington*. In that case, an off-duty police officer was passed by a car that was speeding and swerving and "almost had a head-on collision with an approaching car." 292 F.3d at 1180. The officer turned on his police lights and gave chase, and the car crashed into a curb. *Ibid.* When the officer went to the car to render first aid, the driver put the car in gear and tried to flee, but the car had been too damaged to move. *Id.* at 1180-1181. The driver, who was drunk, hit the officer and grabbed him by the throat and by the tie. *Ibid.* The officer tried to back away, but the driver climbed out the car window, hanging on to the officer. *Id.* at 1181. The struggle continued, and when the driver grabbed the barrel of the officer's gun, the officer fired and killed the driver. *Ibid.*

The district court found the officer liable for damages using the Ninth Circuit's "provocation" theory.

Billington, 292 F.3d at 1185-1186. The Ninth Circuit reaffirmed that theory and restated it as follows: "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1189. As in *Alexander*, the court focused not on whether force was justified at the moment it was employed, but on whether the police officer made earlier "tactical errors" that "made his reasonable use of force at that moment unreasonable." *Id.* at 1185. If the officer made such errors, then he would be liable for injuries caused from the use of force, even though the use of force was reasonable at the time. *Id.* at 1190-1191. The court justified its provocation doctrine with the explanation that "[the officer] shouldn't have gotten himself into the situation, so he couldn't constitutionally shoot his way out of it." *Id.* at 1185-1186. The court concluded, however, that the officer in that case was not liable under the provocation theory because he had not committed any initial constitutional violation. *Id.* at 1191.

4. The Ninth Circuit has applied its provocation doctrine in a number of decisions, including the decision under review here. In *Espinosa*, the court upheld the denial of summary judgment to officers who entered a house they believed was being used for drug sales and then shot and killed a person in the attic. 598 F.3d at 532-533. The court separately analyzed whether the officers acted reasonably at the moment of the shooting and whether they should nonetheless be liable for causing the situation that led to the shooting because they lacked justification to enter the house. *Id.* at 537-539. As the court explained, the

police would be liable under the provocation doctrine if their "illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." *Id.* at 539. The court remanded so a jury could decide whether the police "intentionally or recklessly provoked a confrontation with" the victim. *Ibid.*

In *Sheehan* v. *City & County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), rev'd, 135 S. Ct. 1765 (2015), officers were summoned to assist with the involuntary commitment of an armed, mentally ill woman who was living in a group home. *Id.* at 1217-1218. After the woman retreated into her room, the officers forcibly reentered the room, leading to a confrontation that ended in the non-fatal shooting of the woman. *Id.* at 1219-1220. The Ninth Circuit held that the "use of deadly force—*viewed from the standpoint of the moment of the shooting*—was reasonable as a matter of law," *id.* at 1229, but nonetheless stated that "the events leading up to the shooting" could render the use of force unreasonable, *id.* at 1230. The court remanded to allow a jury to consider "whether the shooting was unreasonable on a provocation theory." *Ibid.* This Court reversed on qualified immunity grounds, *City & Cnty. of S.F.* v. *Sheehan*, 135 S. Ct. 1775, 1776-1778 (2015), and in doing so, it noted that the provocation doctrine had been "sharply questioned" by other circuits, *id.* at 1776 n.4.

In the decision below, the Ninth Circuit, relying on *Billington* and *Espinosa*, held Deputy Conley and Deputy Pederson personally liable for over $4 million in damages using the provocation doctrine. Respondents' "entire theory of the case * * * [wa]s premised upon the law of Fourth Amendment provocation." Pet.

App. 109a. The court did not find a *Graham* violation in the officers' decision to use force; instead, it used the officers' failure to secure a warrant as a reason to deem the later use of force unreasonable. *Id.* at 22a. In the court's view, the officers "created a situation which led to the shooting" and so "liability was proper." *Ibid.* (citation omitted). Although *Billington* required the court to find that the officers acted "intentionally or recklessly" in "provo[king]" the use of force, the court deemed that requirement satisfied by the court's conclusion that it was clearly established that the officers needed a warrant to enter the shack. *Id.* at 23a. The result is that the court imposed personal liability on an excessive-force theory based only on a different clearly established constitutional violation.

D. The Ninth Circuit's Provocation Theory Is Wrong And Ill-Advised

1. The Ninth Circuit's provocation doctrine is inconsistent with *Graham*. The defining feature of the doctrine is that it imposes Fourth Amendment liability, on an excessive-force theory, for a constitutionally reasonable use of force. That is, the doctrine uses an initial constitutional violation by law enforcement (such as an unlawful entry) to transform an "otherwise *reasonable* defensive use of force"—meaning a use of force that would, in itself, satisfy the Fourth Amendment under *Graham*—into unreasonable force. *Billington*, 292 F.3d at 1190-1191. That is directly contrary to *Graham*, which teaches that whether a police use of force is constitutional depends on whether the officer's decision is objectively reasonable at the moment the officer used the force. 490 U.S. at 396-397. If the use of force is justified at that moment (say, because a

suspect is threatening the officer with a gun), then the officer did not use excessive force and the shooting does not violate the Fourth Amendment. *Id.* at 396.

The provocation doctrine starts with the understanding that the officer's use of force was a reasonable response to a perceived threat, but then expands the inquiry to consider whether something else the officer did would justify liability on an excessive-force theory. If the court finds "provocation" in an officer's earlier actions, then the Ninth Circuit deems the "*reasonable* defensive use of force *unreasonable* as a matter of law." *Billington*, 292 F.3d at 1190-1191. The effect of this doctrine is that, once an officer commits a constitutional violation that brings him into contact with a suspect, *any* use of force that ensues may be deemed unreasonable, even if that use of force is reasonable under *Graham*. But the use of force that is reasonable under *Graham* does not become unreasonable because of earlier events that initiated the interactions with the suspect. If the police committed an "independent constitutional violation" (*id.* at 1190) in some earlier action, then a court should analyze liability and damages for that action. See pp. 26-30, *infra*. It cannot use the earlier action to transform a reasonable use of force into a constitutional violation.

The provocation doctrine also focuses on the wrong point in time. *Graham* set out a "reasonableness at the moment" standard. 490 U.S. at 396; see, *e.g.*, *Saucier*, 533 U.S. at 210 ("The proper perspective in judging an excessive force claim * * * is that of a reasonable officer on the scene and at the moment the force was employed.") (Ginsburg, J., concurring in the judgment) (citation and internal quotation marks omitted). That standard makes sense, because the judgment to

use force is often made in a "split-second," under "tense, uncertain, and rapidly evolving" circumstances. *Graham*, 490 U.S. at 397. But the provocation theory expands the time period and the range of police action relevant to assessing an officer's liability for the use of force, so that even if the use of force is reasonable "at the moment" it occurs, the officer could still be liable for that action. Not only is that approach legally wrong, but it places officers in an untenable position: At the moment that an officer is deciding whether to use force, particularly deadly force, he is focused on the immediate threat he is facing, not an earlier point in time. See J.A. 100, 113, 179.

Further, the provocation theory is inconsistent with this Court's decisions because it trains on the officers' subjective motivation. The provocation doctrine applies only where the officer "*intentionally* or *recklessly* provokes a violent confrontation." *Billington*, 292 F.3d at 1189 (emphasis added). As explained by the Ninth Circuit, this inquiry into mental state focuses on the officer's state of mind with respect to the initial constitutional violation (such as an illegal entry), not the use of force. *Id.* at 1190. Whether applied to the initial police action or the later use of force, the state-of-mind inquiry conflicts with the basic Fourth Amendment focus on objective factors. This Court has consistently held that Fourth Amendment liability does not turn on officers' subjective motivations. See *Whren* v. *United States*, 517 U.S. 806, 813-815 (1996); see also, *e.g.*, *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014); *Kentucky* v. *King*, 563 U.S. 452, 464 (2011); *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000); *Graham*, 490 U.S. at 397. In particular, the Court has rejected the view that Fourth Amendment liability for

use of excessive force turns on whether the officer acted recklessly. See *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2476-2477 (2015).[1]

2. In cases involving the police pursuit of reckless drivers, the Court has rejected attempts to judge the reasonableness of an officer's use of force by scrutinizing the police conduct bringing about the need to use force. For example, in *Scott* v. *Harris*, 550 U.S. 372 (2007), the Court considered whether a police officer used excessive force in attempting to stop a high-speed car chase by bumping the fleeing suspect's car with his patrol car. *Id.* at 375. The Court recognized the "high likelihood" that the officer's maneuver would result in "serious injury or death" to the suspect, but found the maneuver justified because of the need to stop the chase and protect the officers and the public. *Id.* at 381-384. In so holding, the Court rejected the view that the police could have avoided the need to use force by "simply ceas[ing] their pursuit." *Id.* at 385. The Court explained that this would not guarantee that the suspect would cease his reckless actions. *Ibid.* And the Court was concerned about the "perverse incentives" created by "a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." *Ibid.* The Court therefore rejected

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[1] Perhaps aware of the conundrum it has created, the Ninth Circuit in this case concluded that if an initial constitutional violation is so clear as to deny qualified immunity, then the officer necessarily acted intentionally or recklessly in provoking a use of force. Pet. App. 23a-24a. That reasoning confuses two separate questions (the state of the law and the officer's state of mind), and it shows that all the circuit requires to impose liability on a provocation theory is a clearly established constitutional violation in the events leading up to the use of force.

the idea that the Fourth Amendment "impose[s] this invitation to impunity-earned-by-recklessness." *Id.* at 385-386.

More recently, in *Plumhoff*, the Court considered the Fourth Amendment reasonableness of a police shooting that was intended to prevent a cornered suspect from resuming a dangerous high-speed chase. 134 S. Ct. at 2020-2022. In finding the officer's use of force reasonable, the Court reiterated that a Fourth Amendment violation cannot be predicated on the notion that the police created the danger by their decision to continue chasing the suspect. *Id.* at 2021 n.3. The district court had held that "the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers' decision to continue the chase." *Ibid.* This Court rejected that reasoning as "irreconcilable with our decision in *Scott*." *Ibid.*

The Ninth Circuit imposes liability for a reasonable use of force if the police "created [the] situation" that "required the officers to use force." *Espinosa*, 598 F.3d at 539; see, *e.g.*, *Cunningham* v. *Gates*, 312 F.3d 1148, 1154 (9th Cir. 2002) (referring to the provocation doctrine as a "danger creation theory"), cert. denied, 538 U.S. 960 (2003). While the Ninth Circuit limits its provocation theory to uses of force following earlier constitutional violations, and the Court in *Scott* and *Plumhoff* examined uses of force that were not preceded by constitutional violations, the relevant point is that this Court declined to call into constitutional question a reasonable use of force because of actions that the police had taken that led up to the use of force.

3. The Ninth Circuit's provocation doctrine has severely negative consequences.

a. First and foremost, it punishes a police officer for a use of force that everyone agrees is reasonable. A police officer who is being threatened by a person with a gun must be able to defend himself. See *Sheehan*, 135 S. Ct. at 1775 ("Nothing in the Fourth Amendment bar[s] [officers] from protecting themselves."). And the police must be able to use force to protect the public from threats. See, *e.g.*, *Plumhoff*, 134 S. Ct. at 2022 (approving use of deadly force to neutralize "a grave public safety risk"). But the provocation doctrine tells police that they are less entitled to use force to defend themselves or others if the police have committed an earlier violation in the string of events leading up to the use of force. Although an officer facing the barrel of a gun likely would respond with force to save his own life regardless of the potential for damages liability, in a close case, the fear of personal liability could lead an officer to forgo use of force and allow a suspect's threat to officers or the public to persist. Cf. *Scott*, 550 U.S. at 385.

The provocation doctrine skews police incentives not only about the use of force, but about antecedent searches and seizures. Law enforcement officers often face dynamic situations calling for quick decisions on the legality of a warrantless entry or of a particular warrantless search or seizure. If an officer makes an incorrect decision, the provocation doctrine will hold him liable (absent a finding of qualified immunity) for any subsequent use of force, however justified in the circumstances. When the officer is liable for every use of force that may occur after an initial constitutional violation, it intensifies the uncertainty that the officer

faces when making a fast decision whether an entry or a search or seizure is justified.

b. The provocation doctrine is open-ended and ill-defined. The approach invites courts to look past established rules identifying certain conduct as reasonable (and thus lawful under the Fourth Amendment) and to engage instead in a standardless inquiry into whether an officer's earlier conduct might nevertheless be viewed as unreasonable in a more general way. And by expanding the inquiry from the moment the police used force to the entire interaction between the police and the suspect, the Ninth Circuit has invited close scrutiny of split-second police judgments based on prior events and actions. See *Alexander*, 29 F.3d at 1365 (police are held personally liable if they "did something wrong that resulted in [the man's] death"). The provocation doctrine removes the focus from the officers' justification at the time they used force and "converts members of the judicial branch of government into tactical managers of the police." *Id.* at 1377 (Trott, J., concurring in part and dissenting in part).

Although this Court has stressed the need to provide clear guidance to the police, see, *e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001), the provocation doctrine creates great uncertainty. The Ninth Circuit's attempts to define the doctrine have done little to help the matter. Although the circuit has said that the police must "*provoke[]* a violent confrontation," *Billington*, 292 F.3d at 1189 (emphasis added), it is unclear whether any actual provocation is required, see Pet. App. 118a ("[T]he predicate constitutional violation (here, illegal entry) need not be menacing or 'provocative' in the sense of inciting a violent response."); see also *Espinosa*, 598 F.3d at 539 (ask-

ing whether the police "created a situation which led to the shooting").[2] Although the court of appeals has sometimes referred to proximate cause as an ingredient of the provocation doctrine, *Billington*, 292 F.3d at 1190, here it treated proximate cause as a separate, alternative legal theory, Pet. App. 24a-25a. And although the doctrine requires the police to act "intentionally or recklessly" in committing an initial constitutional violation, *Billington*, 292 F.3d at 1190, here the court of appeals did not require such proof, see Pet. App. 23a; p. 17, *supra*. As a result, it appears that all a court needs to find liability on a provocation theory is a prior constitutional violation leading to an encounter and a later use of force. See Pet. App. 22a-24a.

c. The provocation doctrine erodes the protections of qualified immunity. The doctrine makes it very difficult for an officer in an excessive-force case to avoid "stand[ing] trial or fac[ing] the other burdens of litigation," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation omitted), because even if the officer's use of force is objectively reasonable, he can be sued on another theory—that he should have done something differently earlier in the process. According to the Ninth Circuit, all the plaintiff needs "to justify an *Alexander* instruction" is to provide some "evidence to show that

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[2] At least one circuit has approved a provocation theory that does not even require the police to commit an initial constitutional violation. See *Jiron* v. *City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) (stating that a police shooting can be found unreasonable if the "reckless or deliberate [police] conduct during the seizure unreasonably created the need to use such force") (citation omitted). That approach has all of the problems of the Ninth Circuit's doctrine, with the added problem that it imposes Fourth Amendment liability without any constitutional violation at all.

the officer's actions were excessive and unreasonable, and that these actions caused an escalation that led to the shooting." *Duran* v. *City of Maywood*, 221 F.3d 1127, 1131 (2000) (per curiam). And because the provocation question is so open-ended and fact-specific, it is very difficult for officers to obtain summary judgment in an excessive-force case. See, *e.g.*, *Sheehan*, 743 F.3d at 1229-1230 (finding "triable issues of fact as to whether the shooting was unreasonable on a provocation theory" even though "the officers' use of deadly force" was "reasonable" at "the moment of the shooting"); *Espinosa*, 598 F.3d at 538-539 (finding "genuine issues of fact regarding whether the officers intentionally or recklessly provoked a confrontation"); *Alexander*, 29 F.3d at 1366 (denying summary judgment on a claim that the officers acted unreasonably in "creating the situation which caused [the suspect] to take the actions he did").

4. This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for "the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, including "what the officer knew at the time" he decided to use force, *Kingsley*, 135 S. Ct. at 2473; see *Plumhoff*, 134 S. Ct. at 2023 (The "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she faced."). But consideration of the facts and circumstances leading up to a use of force in evaluating the reasonableness of that action is different from using a prior unreasonable decision to impose liability for a reasonable use of force.

In this case, for example, the officers were in a backyard looking for a wanted parolee whom they

believed to be armed and dangerous; they had cleared the sheds and thought the man might be hiding in the shack; and when they opened the door to the shack, they were confronted by a man with a gun. Those were the "facts and circumstances" (*Graham*, 490 U.S. at 397) relevant to whether the use of force was reasonable. That the officers had entered the shack without a warrant does not alter the danger that the officers then confronted—an immediate threat that justified the use of deadly force. Acknowledging the relevance of some earlier events, including in some cases the actions of police, in analyzing the reasonableness of the use of force is quite different from blaming police for the need to use force at all.

II. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE OFFICERS' WARRANTLESS ENTRY INTO THE SHACK PROXIMATELY CAUSED RESPONDENTS' INJURIES FROM THE SHOOTING

The Ninth Circuit also erred in its alternative proximate-causation holding.

A. Under Tort-Law Causation Principles, Officers Are Liable For Injuries They Proximately Caused Unless A Superseding Cause Intervenes

1. This is an action under 42 U.S.C. 1983 brought against state officers for violating the Constitution. Section 1983 "creates a species of tort liability," and the "common law of torts" helps define "the elements of damages and the prerequisites for their recovery." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (citations omitted). Causation is a necessary element of a constitutional-tort claim under Section 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961) (Section 1983 is "read against the background of tort liability that makes a man

responsible for the natural consequences of his actions."); see also *Malley* v. *Briggs*, 475 U.S. 335, 344 n.7 (1986); *Hector* v. *Watt*, 235 F.3d 154, 162 (3d Cir. 2001) (Nygaard, J., concurring).

2. In order to hold a person liable in tort for an injury, his actions must have proximately caused that injury. Proximate cause "refers to the basic requirement" of a "direct relation between the injury asserted and the injurious conduct alleged." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014) (citations omitted). "Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 692 (2011). "[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 692 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Proximate cause is often explained "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719; see 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, at 493 (2010) (Third Restatement); 2 Restatement (Second) of Torts § 435, at 449 (1965) (Second Restatement). Foreseeability is not a mathematical probability, but a question of the "natural and probable risks that a reasonable person would likely take into account in guiding her practical

conduct." *In re Signal Int'l, LLC*, 579 F.3d 478, 491-492 (5th Cir. 2009) (internal quotation marks omitted); see, *e.g.*, *Milwaukee & Saint Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1877). As a general matter, "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Third Restatement § 29, at 493.

Even if a harm is foreseeable, the original actor is not liable for that harm when another act intervenes and the intervening act can be considered a "superseding cause." Second Restatement §§ 440-442, at 465-468; see Third Restatement § 34, at 569. Whether an intervening act supersedes the original tortious conduct depends on a variety of factors, including whether that act and the harm it caused was foreseeable and expected, or whether the intervening act is "unforeseeable, unusual, or highly culpable." Third Restatement § 34, cmt. e, at 572-573; see Second Restatement § 442, at 467-468 (setting out factors relevant to whether an intervening force qualifies as a superseding cause).

3. Because the concepts of proximate and superseding causes represent a judgment that only certain causes should result in legal liability, courts applying those doctrines in constitutional-tort cases should account for the legal rules defining the substantive right in question, as well as the rules of qualified immunity and the principle that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. When evaluating proximate cause in the context of actions for constitutional torts, the foreseeability inquiry is not an abstract assessment of what might happen; it looks instead to whether a harmful outcome is the kind associated with the legal rules the official violat-

ed. For example, it may be foreseeable that a police officer's entry into a home without knocking and announcing his presence could in some cases lead to a use of force, see *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006), but it is generally not foreseeable that entering a home without a warrant would lead to violence. An unannounced entry may lead to surprise, confusion, and a violent response, but the mere absence of a warrant need not have that effect. Further, mere foreseeability of the *potential* need for force is not enough to establish proximate causation, because a potential need for force exists in almost every police encounter.

Actions taken by the targets of the police activity may well constitute superseding causes. Society generally expects a person confronted by a uniformed police officer to follow the officer's instructions rather than violently resisting. See *Hundley* v. *District of Columbia*, 494 F.3d 1097, 1104-1105 (D.C. Cir. 2007) ("[I]t is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer[.] * * * [C]itizens have a duty to obey a police officer's orders, and officers are entitled to assume that citizens will comply with their orders."). For example, if police officers unlawfully enter a home to effect an arrest, then identify themselves to the occupant and attempt to arrest him, the occupant's decision to grab a gun and shoot at the officers would be a superseding cause that limits the officers' liability. See *Bodine* v. *Warwick*, 72 F.3d 393, 400-401 (3d Cir. 1995) (Alito, J.). Or if a person who stole a car and was fleeing from the police voluntarily crashed into a police roadblock rather than stopping, the person's decision to hit the roadblock would be a super-

seding cause that cut off police liability. See *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989). This is not to say that the police could never be liable for damages from violence that resulted from an earlier clearly established constitutional violation, but only that such liability should be rare.

B. The Warrantless Entry In This Case Did Not Proximately Cause Respondents' Injuries From The Shooting

The court of appeals concluded that Deputy Conley and Deputy Pederson "are liable for the shooting under basic notions of proximate cause." Pet. App. 24a. The court reasoned that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." *Id.* at 25a. That was error. Even assuming that the warrantless entry into the shack violated respondents' Fourth Amendment rights, and that the violation was clearly established, the warrantless entry did not proximately cause the shooting. If anything, it was the failure to knock and announce, which was not a clearly established violation of the Fourth Amendment, that proximately caused it.

The causation analysis here proceeds from the assumption that the officers did not violate the Constitution in their decision to shoot respondents, and so the only potential violation of respondents' constitutional rights that could be a basis for damages is the unlawful entry. Pet. App. 22a, 25a. With respect to that entry, although the court of appeals concluded that the officers erred both in entering the shack without a warrant and in failing to knock and announce their presence, the court concluded that only the first error could be a basis for personal liability because the

officers had qualified immunity for the second error. *Id.* at 18a-22a. Accordingly, the question is whether the officers' decision to enter the shack *without a warrant* proximately caused respondents' injuries from the shooting. See *id.* at 22a.

The court of appeals' conclusion that the warrantless entry was the proximate cause of respondents' injuries fails on the court's own analysis of the cause of the shooting. That is because the court found that the failure to knock and announce—not the warrantless entry—was the reason for the shooting. According to the court, "an announcement that the police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, [respondents] would not have been shot." Pet. App. 21a-22a. The court found the shooting to be a reasonably foreseeable consequence of the entry because "the officers *barged into the shack unannounced*," *id.* at 25a (emphasis added), not because the officers lacked a warrant.[3]

The warrantless entry alone could not have proximately caused the injuries from the shooting, because a warrantless entry, coupled with a knock and announcement, would almost certainly have led Mendez to put away the BB gun before opening the door to the

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[3] This is not to say that it is reasonably foreseeable that any failure to knock and announce will lead to violence. In many situations, the police are not required to announce their presence. See *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 (1997); *Wilson* v. *Arkansas*, 514 U.S. 927, 934-936 (1995). And even when they are, other factors are relevant to the causation analysis, such as whether the individuals inside a home saw the police outside, or whether the police identified themselves after entering the home.

officers. And since it was not clearly established that the officers had to knock and announce in this situation, Pet. App. 18a, they cannot be held liable for any resulting injuries. That is what qualified immunity means. See *Harlow*, 457 U.S. at 818; see also *Bodine*, 72 F.3d at 400 (officers "certainly would not be liable for harm that was caused by their non-tortious, as opposed to their tortious, 'conduct,' such as the use of reasonable force to arrest [the suspect]").

The Ninth Circuit's decision essentially substituted "but-for" causation for proximate cause. For an unlawful entry, the entry would be the but-for cause of everything that follows during the interaction with police, at least until the police action has concluded. Here, even if the warrantless entry was a but-for cause of the injuries from the shooting, it was not the proximate cause. While it is true that the officers would not have fired if they had not entered, if the officers had obtained a warrant it would not have appreciably reduced the danger presented by the unannounced entry into the shack. That is, it was only the "unannounced" entry, Pet. App. 25a, that proximately caused the shooting. In relying on but-for causation, the Ninth Circuit confused a necessary condition for tort liability with a sufficient one.[4]

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[4] Mendez's pointing a gun towards the officers also may well be a superseding cause that would separately preclude liability for the shooting. However, because the court of appeals erred in concluding that the warrantless entry proximately caused the shooting, it is unnecessary for the Court to consider this issue.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2017

No. 16-369

FILED
FEB 23 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,

Petitioners,

—v.—

ANGEL MENDEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTHERN CALIFORNIA, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI* CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately one million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as *amicus*. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of Southern California is an affiliate of the ACLU.

SUMMARY OF ARGUMENT

The bedrock of this Court's Fourth Amendment jurisprudence provides that whether a search or seizure is reasonable, and therefore constitutional, depends on the "totality of the circumstances." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The rule applies to all searches and seizures, from brief investigatory stops to the use of deadly force. In repeatedly directing courts to consider the "totality of the circumstances," the Court has refused to artificially rule out any relevant facts or circumstances. Instead, it has insisted that

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[1] Pursuant to rule 37.6, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party's counsel authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel have paid for the preparation or submission of this brief.

reasonableness "is not capable of precise definition or mechanical application," and therefore the analysis "requires careful attention to the facts and circumstances of each particular case." *Id.* (internal citations omitted). To assess the reasonableness of an officer's search or seizure, courts must consider *all* the circumstances that give rise to the encounter.

Petitioners propose a radical departure from this longstanding approach, suggesting that courts should blind themselves to any conduct of an officer that precedes the moment that he or she pulls the trigger or otherwise uses lethal force. But this Court has repeatedly reaffirmed that "totality of the circumstances" means what it says, and that the inquiry must consider all the surrounding circumstances. Never before has the Court ruled out any consideration of an officer's conduct preceding a search or seizure. To the contrary, the Court has refused proposals to privilege certain factual aspects to the exclusion of others, rejecting even "admirable" "attempt[s] to craft an easy-to-apply legal test in the Fourth Amendment context." *Scott v. Harris*, 550 U.S. 372, 383 (2007). Instead, this Court has insisted on the need to "slosh [its] way through the factbound morass of 'reasonableness.'" *Id.*

Petitioners' argument that the Ninth Circuit's "provocation rule" conflicts with *Graham v. Connor* rests on a misinterpretation of that case that is directly at odds with the Court's foundational "totality of the circumstances" approach. Taking a single phrase from *Graham* completely out of context, Petitioners argue that the Court's reference to a "standard of reasonableness at the moment" precludes any consideration of an officer's actions

preceding the precise moment that he uses lethal force. They go so far as to argue that even "the seconds immediately before the seizure . . . are not relevant to the reasonableness of the seizure." Pet. Br. at 30. On this view, if a plainclothes officer broke into a home in the middle of the night unannounced bearing a weapon and confronted a homeowner who sought to defend himself, he would be constitutionally permitted to shoot the homeowner if, at the moment the owner sought to act in self-defense, the officer feared for his own life. So, too, an officer who leapt into the path of an oncoming car could shoot to kill the driver, so long as, at the "moment" the officer shot, he feared for his own life. Such actions would plainly be "unreasonable," precisely because of the officer's antecedent conduct. Yet under Petitioner's blindered approach, they would be immune from any liability.

Petitioners' argument rests on an artificial separation of analysis into two distinct times. Focusing solely on the precise moment of the shooting, and ignoring anything the officers did to create the threat that in turn led them to shoot. Petitioners argue that the officers' use of force here was reasonable because at the moment they shot, they saw a man with a gun and reasonably feared for their lives. They portray the Ninth Circuit's consideration of the officers' unreasonable and unconstitutional entry into the Mendez's home, which created the danger to which the officers then responded and proximately caused the shooting, as improperly "rolling the clock back to before that critical moment." Pet. Br. at 3.

Petitioners' time-limited approach is at odds with this Court's use of force jurisprudence as well as its interpretation by lower courts. *Graham*'s reference to "reasonableness at the moment," read in context, merely cautions courts to judge force from the perspective of the officer in the field rather than applying 20/20 hindsight. 490 U.S. at 396. It does not suggest that courts must close their eyes to an officer's actions, no matter how unreasonable or provocative, that may have led to a shooting.

Both this Court and courts of appeals have regularly considered all the events preceding a shooting as part of the totality of the circumstances necessary to evaluate reasonableness. As a suspect's conduct prior to the shooting is plainly relevant, Petitioners' suggestion that the courts blind themselves to the officer's conduct is not only limited, but one-sidedly so. Several courts of appeals have directly rejected Petitioners' interpretation of *Graham*, holding that the "totality of the circumstances" encompasses the conduct of officers prior to their use of force. Those courts have recognized that officers may be liable for excessive force when their actions directly create the justification for force, as the Ninth Circuit in essence held here. Even when they have acknowledged the presence of a threat to the officer at the moment of the shooting, several courts of appeals have held force unreasonable where officers unreasonably gave rise to that threat in the first place through their own unreasonable conduct—such as leaping into the path of an oncoming car or breaking into homes without announcing themselves.

To preclude consideration of an officer's precipitating conduct in assessing the reasonableness of his use of deadly force would also contradict police training and best practices on the use of force, at a time when police shootings are a matter of grave public concern. Officer-involved shootings in recent years have sparked widespread protest and police departments have sought to respond to the ongoing problem by training their officers in how to de-escalate confrontations before they rise to the level of lethal force. Police chiefs and experts agree that best practices on use of force must emphasize not merely the decision to shoot, but how the officer handles the situation and avoids force by slowing down, creating space, and using de-escalation tactics. A "totality of the circumstances" test that includes consideration of the officer's conduct leading up to the use of force is consonant with those policies and training. Petitioner's time-limited approach, by contrast, sends the message that the Fourth Amendment wholly disregards the police officer's own contribution to a lethal force situation.

Finally, reaffirming the totality approach does not mean expanding liability for officers. Officers remain protected by the doctrine of proximate cause from liability for the superseding actions of others, and by qualified immunity for conduct that was not clearly unconstitutional at the time.

However this Court views the Ninth Circuit's provocation rule, it should reject Petitioners' attempt to limit *Graham* to consideration of the officer's conduct only at the precise moment force was applied. Instead, this Court should reaffirm adherence to a "totality of the circumstances"

approach that determines the reasonableness of an officer's use of force based on any relevant facts, including the officer's conduct in the moments before that proximately causes the use of force.

ARGUMENT

I. PETITIONERS' TIME-LIMITED APPROACH TO USE OF FORCE IS INCONSISTENT WITH THE BEDROCK PRINCIPLE THAT COURTS EVALUATE FORCE BASED ON THE "TOTALITY OF THE CIRCUMSTANCES."

Petitioners argue that a court assessing the reasonableness of a use of force must consider the officer's actions only at the very moment that he or she pulls the trigger, wholly disregarding any conduct of the officer that may have given rise to the confrontation "even seconds before" shots are fired. Pet. Br. at 30. This approach, based on a strained misreading of a single phrase in *Graham v. Connor*, is contrary to this Court's longstanding insistence that the reasonableness of any search or seizure depends on the "totality of the circumstances," that is, *all* the circumstances. To artificially carve out the officer's own action from the "totality" inquiry leads to absurd results, and is contrary to this Court's consistent approach to searches and seizures.

A. This Court Has Consistently Repudiated Attempts To Narrow The Fourth Amendment's Reasonableness Inquiry.

The Fourth Amendment mandates that all searches and seizures be "reasonable," and this Court

has long held that this determination requires consideration of the "totality of the circumstances." That standard applies to all searches and seizures, including the use of deadly force. *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Totality" means "totality." One cannot assess the reasonableness of any search or seizure without considering all the circumstances that led to the police action in question, and this Court has never ruled out consideration of any category of conduct in the determination of what is reasonable. The "totality of the circumstances" standard is "in the nature of a test which must accommodate limitless factual circumstances." *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

The Court first applied the "totality of circumstances" standard to police use of force under the Fourth Amendment in *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). There, the Court examined "the nature and quality of the intrusion" and the "importance of the governmental interests alleged" to ask "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8-9. The Court reaffirmed that standard four years later in *Graham*, holding that that the Fourth Amendment inquiry set forth in *Garner* provided the exclusive framework for assessing the constitutionality of police use of force, and rejecting the lower court's application of an independent due process analysis. The Court emphasized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," and restated that the "question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'" *Graham*, 490 U.S. at 396 (citations and alterations omitted).

In *Scott v. Harris*, 550 U.S. 372 (2007), the Court left no doubt that the Fourth Amendment analysis of uses of force must remain flexible and consider all circumstances. There, the Court rejected the argument that *Garner* had created a bright-line rule, and instead embraced a factual inquiry based on all relevant circumstances: "Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.* at 383.

B. Petitioners' Approach Relies On A Distorted Reading Of *Graham*.

Petitioners' argument that the Ninth Circuit's "provocation rule" conflicts with *Graham* rests on a strained misinterpretation of *Graham* at odds with this foundational "totality of the circumstances" approach. Relying on a passing reference in *Graham* to "standard of reasonableness at the moment," Petitioners argue that courts evaluating the use of force can consider only the officer's decision to pull the trigger, and that the officer's own conduct, even "the seconds immediately before the seizure . . . are not relevant to the reasonableness of the seizure." Pet. Br. at 30.

Petitioners' defense rests on ignoring the circumstances precipitating the shooting. Looking only at the moment of the shooting, Petitioners maintain that the deputies' use of force was reasonable because they saw a man with a gun and reasonably feared for their lives. Having concluded that the shooting was reasonable based on this artificially blindered examination of a single "moment" of the officers' conduct, they portray the

Ninth Circuit's consideration of the officers' unreasonable—and unconstitutional—entry into the Mendez home, which proximately caused the shooting, as improperly "rolling the clock back to before that critical moment." Pet. Br. at 3.

Graham imposes no temporal bar against considering the conduct of officers leading up to a use of force. Read in context, *Graham*'s use of the word "moment" merely requires courts to put themselves in the shoes of the officer on the scene, rather than evaluating his or her actions with the omniscience of hindsight:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about

> the amount of force that is necessary in a particular situation.

Graham, 490 U.S. 396–97 (quotations and citations omitted). Nothing in this passage—which contains *Graham*'s only use of the word "moment"—suggests that courts should exclude any consideration of the officers' own conduct other than the use of force itself, or that courts cannot consider an officer's actions in the period leading up to a use of force in evaluating its reasonableness.

Contrary to Petitioner's description of "[t]his Court's repeated emphasis on the 'moment' of the seizure in its excessive-force cases," Pet. Br. at 17, subsequent decisions of this Court either use the word "moment" in the same way *Graham* did, or do not use it at all. *See, e.g.*, *Saucier*, 533 U.S. at 206-07 (quoting *Graham*'s "reasonableness at the moment" language and explaining that "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred"). And while *Graham* acknowledged that it was not adopting a new constitutional rule, but only making "explicit what was implicit" in *Garner*, 490 U.S. at 395, *Garner* never used the word "moment," never suggested a limited time-frame for the circumstances relevant to the "reasonableness" analysis, and framed the inquiry as "whether the totality of the circumstances justified a particular sort of search or seizure." 471 U.S. at 8-9.

Petitioners conflate *Graham*'s prohibition on "armchair quarterbacking," Pet. Br. at 34, with an inquiry artificially limited to officers' conduct at the moment force was used. But the latter does not

follow from the former. It is true that the "reasonableness" inquiry is only triggered by the seizure itself –the use of force– but that does not mean that assessing whether the seizure was reasonable ignores facts that led up the seizure. Indeed, one cannot assess the reasonableness of any search or seizure without considering the facts that gave rise to the encounter. And nothing in the *Graham* Court's warning against hindsight supports blinding the Court to *all* the facts that make up the "totality of circumstances." Courts can, and do, assess officers' actions based on the information available to the officers at the time, with allowance for split-second decisions, without ignoring an officer's own conduct before the officer pulls the trigger.

II. THIS COURT HAS CONSISTENTLY CONSIDERED THE CONDUCT OF OFFICERS LEADING UP TO THE USE OF FORCE.

In every use of force case that this Court has considered, it has examined the conduct of officers leading up to the use of force as part of the "totality of the circumstances" that determine the reasonableness of the use of force.

In *Garner* itself, this Court considered whether an officer gave a warning—conduct clearly preceding the use of force—as one factor relevant to the Fourth Amendment's reasonableness analysis. 471 U.S. at 11-12 (use of force against a "fleeing felon" may be reasonable "if the suspect threatens the officer with a weapon ... *and if, where feasible, some warning has been given*") (emphasis added).

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), this Court held that the estate of a driver killed in a collision with a police roadblock could pursue a claim based on "the unreasonableness ... of setting up the roadblock in such manner as to be likely to kill him." *Brower* illustrates that the unreasonableness of a seizure may be established by the dangerous manner in which it is "set[] up" or "set in motion" by officers, before the moment the seizure occurs. *Id.*; *see also St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995) ("*Brower* held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.").

Similarly, in *Scott*, the Court pointed to officers' efforts to give warning and opportunity for compliance before the use of force, noting, in the course of finding one officer's conduct reasonable, that police officers had been warning plaintiff to stop "with blue lights flashing and sirens blaring . . . for nearly 10 miles" before the officer rammed plaintiff's vehicle. 550 U.S. at 384. In concurring, Justice Ginsburg identified as a "relevant consideration" whether "there [was] a safer way, given the time, place and circumstances" for the officer "to stop the fleeing vehicle." *Id.* at 387 (Ginsburg, J., concurring).

In analyzing other uses of force following pursuits, like *Scott*, this Court has similarly examined the entire course of the chase to assess the reasonableness of the shootings. *See, e.g., Plumhoff v. Rickard*, 134 S.Ct. 2012, 2021-22 (2014) (analyzing minutes before officers fired shots to determine the reasonableness of their use of force); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (considering events of

eighteen-minute chase preceding officer's shooting of car to determine whether officer was entitled to qualified immunity).[2]

Most recently, in *White v. Pauly*, 580 U.S. ____, 137 S. Ct. 548 (2017), the Court examined the officer's conduct leading up to the shooting to grant qualified immunity to an officer who shot an armed individual without first giving a warning by — specifically noting that the officer in question had arrived late to the ongoing police action and had already witnessed shots being fired at other officers. 137 S. Ct. at 552. The Court did *not* hold that an officer's failure to warn before using deadly force is always irrelevant to the excessive force analysis, much less that *Graham* precluded it from considering the officers' conduct prior to the "moment" of the shooting. To the contrary, the Court not only looked closely at the question of warning, but also took care to "express[] no position" on whether the shooting would be unreasonable if the officer had fired shots knowing that the other officers had not identified themselves as police, and without first taking corrective action. *Id.* The Court based its holding on the officer's reasonable assumption that such procedures had been followed. *Id.* at 552-53. Justice

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[2] Contrary to Petitioners' suggestion, Pet. Br. at 31, the Court in *Plumhoff* did not reject—or even mention—the provocation rule. And the Court did not fault the district court for considering the officers' conduct leading up to the moment of the shooting, but instead conducted its own evaluation of that conduct and concluded that the officer's conduct was reasonable. *Plumhoff*, 134 S.Ct. at 2021 n.3 (affirming reasonableness of officer's decision to chase suspects who were "driv[ing] so recklessly that they put other people's lives in danger").

Ginsburg wrote a separate concurrence, emphasizing that the Court's opinion did not foreclose excessive force claims against the other officers, who may have precipitated a violent confrontation by threatening to enter the house without adequately identifying themselves as police, or even against the officer at issue if there were factual disputes over "when [he] arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order [the subject] to drop his weapon." *Id.* at 553 (Ginsburg, J., concurring). Yet under Petitioners' approach, no such caveats would have been necessary, because whatever the officers did prior to the shooting would be per se irrelevant.

This Court's consideration of officer conduct before the use of force goes beyond warnings and demands. In *Tolan v. Cotton*, 134 S.Ct. 1861 (2014), this Court considered evidence of an officer's pre-shooting conduct to reverse the lower court's summary judgment ruling in favor of the officer. The officer claimed that Tolan verbally threatened him "in the moments before the shooting," justifying the use of force. *Id.* at 1867. But before Tolan uttered the verbal exclamation that the officer took as a threat, the officer grabbed Tolan's mother by the arm and slammed her against a garage door with enough force to cause bruising that lasted for days. *Id.* The Court looked to this conduct by the officer, before the shooting, to conclude that a jury "could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother." *Id.* And in granting qualified immunity to officers who shot a woman in her private room of a group home in *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct.

1765 (2015), the Court carefully analyzed the officers' decision to reopen the door to her room after she had threatened them with a knife — conduct that preceded their actual use of force. *Id.* at 1777.[3]

The principle that the "totality of the circumstances" means "totality," and does not preclude consideration of an officer's own conduct, is also established outside the use of force setting. In *Kentucky v. King*, 563 U.S. 452 (2011), the Court addressed an analogous question regarding "police-created exigency": whether officers could invoke the exigent circumstances exception to the warrant requirement when the officers' own conduct had created the exigency. The Court held that courts must consider the reasonableness not only of the exigency itself, but of the police officers' own conduct "preceding the exigency":

> [T]he answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. . . . [W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that

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[3]Although the Court in *Sheehan* made clear it was neither approving or disapproving of the Ninth Circuit's provocation rule, 135 S. Ct. at 1776 n.4, it could easily have resolved the case by adopting the time-limited view of *Graham* that Petitioners' urge is governing law, but did not do so.

> the exigent circumstances rule justifies a warrantless search when the conduct of the police *preceding the exigency* is reasonable in the same sense.

Id. at 462 (emphasis added).

So too, here, the Court should reject Petitioners' omission of the officers' conduct in the moments prior to the use of force and hold that an officer's use of force is reasonable under the Fourth Amendment where the officer's conduct that proximately causes that use of force—including conduct prior to the moment force is applied—is reasonable.[4]

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[4]The appropriateness of the "totality of the circumstances" approach is reinforced by reference to the reasonableness analysis under tort law, which similarly requires the factfinder to consider "all the attendant circumstances" relevant to a defendant's actions. *The Nitro-Glycerin Case*, 82 U.S. 524, 536 (1872). Fourth Amendment law developed out of the common law tort action against officers, and therefore tort principles help guide the Court's understanding of the Fourth Amendment. Tort law evaluates an actor's entire course of conduct when assessing the reasonableness of his or her actions. *See* Restatement (Second) of Torts: § 292, cmt. on clause (c) (reasonableness considers "whether an actor has acted reasonably in pursuing a particular course of conduct rather than another and less dangerous course. . . ."). The likely consequences set in motion by his conduct—including the intentional and non-volitional responses of others—necessarily affect the reasonableness determination. Restatement (Second) of Torts § 303 ("An act is negligent if the actor intends it to affect, . . . or should realize that it is likely to affect, the conduct of another . . . in such a manner as to create an unreasonable risk of harm to the other."). Relevant circumstances may include quickly evolving, emergency situations, but "[w]here the emergency itself has been created by the actor's own . . .

III. COURTS OF APPEALS CONSIDER THE CONDUCT OF OFFICERS LEADING UP TO THE USE OF FORCE.

Given the number of officer-involved shootings and uses of lethal force, the lower courts have frequently applied the Fourth Amendment in such settings. They have been guided by this Court's mandate to consider the "totality of the circumstances" and have regularly considered, in that inquiry, the officer's own conduct preceding the use of force itself. The experience of the lower courts is instructive because it demonstrates both that the "totality" approach is workable, and that there is no need to adopt the artificially blindered approach that Petitioners urge here.[5]

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tortious conduct, the fact that he has then behaved in a manner entirely reasonable in light of the situation with which he is confronted does not insulate his liability for his prior conduct." Restatement (Second) of Torts § 296 (1975); *see also Chritton v. Nat'l Transp. Safety Bd.*, 888 F.2d 854, 861 (D.C. Cir. 1989) ("It is a basic principle of tort law that the 'emergency doctrine' . . . obviously cannot serve to excuse the actor when the emergency has been created through his own negligence'" (internal citation omitted)). These principles align with *Graham's* "totality of the circumstances" test and compel consideration of an officer's course of conduct when determining whether his or her actions were constitutionally reasonable.

[5]Petitioners assert that the "vast majority" of circuits have rejected the provocation rule, but only one of the cases they cite in support of this claim even addresses the rule. *See* Pet. Br. at 25 n.3 (citing *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007)). Moreover, some of the cases Petitioners cite *did* consider the officers' conduct leading up to the moment force was applied to determine whether the use of force was reasonable, *see, e.g.*, *Menuel v. City of Atlanta*, 25 F.3d 990, 996-997 (11th Cir. 1994), and others provide no reasoned discussion of how refusal to

Several courts of appeals have expressly held that *Graham* encompasses officer conduct prior to the use of force. *See, e.g., Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) ("[P]olice officers' actions for [excessive force cases] need not be examined solely at the 'moment of the shooting.' [Citation omitted.] This rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'"); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1189 (10th Cir. 2001) ("the 'totality of the circumstances' surrounding a seizure embraces conduct 'immediately connected with the seizure'"); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e do not see how [we] can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.").

Other circuit courts have not expressly rejected a time-limited approach under *Graham* but nonetheless have considered the conduct of officers leading up to the use of force in evaluating Fourth Amendment claims. *See, e.g., Williams v. Indiana State Police Dept.*, 797 F.3d 468, 483 (7th Cir. 2015), *cert. denied sub nom. Blanchard v. Brown*, 136 S.Ct. 1712 (2016) ("the circumstances known by [the

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consider the officer's conduct leading up to the moment of force can be reconciled with this Court's "totality of the circumstances" approach, *see Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995).

officer], or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one"); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (considering officer's conduct leading up to leg-twisting maneuver that seriously injured plaintiff, because "[t]he better way to assess the objective reasonableness of force is to view it in full context").[6]

In *Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015), for example, an officer shot a suicidal man sequestered in his garage, immediately after breaking in and encountering the man with a gun in his lap. The Seventh Circuit noted that the officer did not try to talk to the man before making an unannounced entry "within three minutes of arriving at the scene." *Id.* at 451. Assessing the totality of the circumstances, including the officer's knowledge and conduct preceding the shooting, the court concluded that there was a material dispute of fact as to

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[6] Based on such reasoning, several circuit courts have held that the decision to deploy a SWAT team, if unreasonable in light of the totality of the circumstances, can be the basis for an excessive force claim—even though such a decision precedes the moment that force is applied. *See Terebesi v. Torreso*, 764 F.3d 217, 225, 234 (2d Cir. 2014); *Estate of Smith v. Marasco*, 430 F.3d 140, 149–50 (3d Cir. 2005); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001). Similarly, "[t]here is widespread agreement among the circuits that have addressed the issue that a claim is stated under the Fourth Amendment for objectively unreasonable conduct during the effectuation of a seizure that results in the unintentional discharge of an officer's firearm." *Stamps v. Town of Framingham*, 813 F.3d 27, 37 (1st Cir. 2016); *see also Watson v. Bryant*, 532 Fed. Appx. 453, 457-58 (5th Cir. 2013); *Leber v. Smith*, 773 F.2d 101, 105 (6th Cir. 1985).

whether the officer's actions were "objectively unreasonable." *Id.* ("[K]icking down a door and immediately shooting a suicidal person who is neither resisting arrest nor threatening anyone save himself is an excessive use of force.").

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the Seventh Circuit denied qualified immunity to an officer who shot a suspect after leaping directly into the path of the suspect's car. The court held a jury could conclude the officer "unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him, because the decedent would have been unable to react in order to avoid presenting a deadly threat to [the officer]." *Id.* at 234; *accord Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (citing *Enyart* as an example of excessive force); *see also Edmond v. City of New Orleans*, 20 F.3d 1170 (5th Cir. 1994).

Weinmann and *Starks* are consistent with a long line of cases in which circuit courts have recognized that officers may be liable for excessive force when their own actions directly create their justification for force. Thus, in *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005), the court held that an officer could not order a suspect to get out of his hiding place and then rely on the suspect's movement to justify the use of lethal force. In *Ribbey v. Cox*, 222 F.3d 1040, 1042 (8th Cir. 2000), the court held that an officer could not unreasonably break a car window and then rely upon the suspect's "reflex[ive] [movement] to protect himself from the breaking glass" to justify the use of lethal force. And in *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991), the court ruled that an officer could not deploy an

attack dog and then rely upon the suspect's inability to put his hands up as the dog attacked him to justify a subsequent use of force. *See also Smith v. Ray*, 781 F.3d 95, 104 (4th Cir. 2015) (officer liable for "taking an unreasonably aggressive tack that quickly escalated . . . to a violent exchange when the suspect instinctively attempted to defend h[er]self") (citing *Rowland*, 41 F.3d at 174); *cf. Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1502 (11th Cir. 1985) (shooting directly resulting from decedent's efforts to escape officers' unwarranted physical abuse "g[a]ve grounds for relief under the fourth amendment"), *cert. denied, Bailey v. Pennsylvania*, 476 U.S. 1115 (1986).

Other courts of appeals have held that officers may violate the Fourth Amendment by unreasonably entering private homes, unannounced and in the dark of night, and then shooting residents who react to their presence. *Sledd v. Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996) (officers acted unreasonably by shooting resident of a home who was carrying a gun, where they broke into the house at night without identifying themselves as police or announcing their purpose); *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) ("It was not 'objectively reasonable'" for officer to enter a dark hallway of residence at night without identifying himself and shoot occupant of home who perceived him to be an intruder). The Ninth Circuit's provocation rule is another iteration of this same principle, and allows that "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177,

1189 (9th Cir. 2002). In *Alexander v. City and Cty. of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994), the court of appeals held that summary judgment was not appropriate where seven officers, without an arrest warrant, entered the home of "a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered[,]" and shot him upon entry.

In each of these cases, circuit courts held that officers violated the Fourth Amendment by injuring civilians who posed a perceived risk only because of the officers' own unreasonable conduct preceding the moment that force was used.

Petitioners' approach would lead to the opposite result in virtually all of these cases. It would preclude consideration of the officers' conduct, and impose a one-sided inquiry that upends the "careful balancing" required by the Fourth Amendment, *Graham*, 490 U.S. at 396, giving weight to events leading up to the use of force that speak to the government's interests, while disregarding officers' conduct from the same timeframe relevant to the "nature and quality" of the intrusion. Under Petitioners' approach, a court weighing the "relative culpability" of the persons at risk in a situation, pursuant to *Scott*, 550 U.S. at 384, could consider whether a person "intentionally placed himself and the public in danger," *unless that person was the officer who used force.* Thus, Petitioners' proposed standard is not only time-constrained, but also inequitably so. *See Abraham*, 183 F.3d at 291 ("[E]ven apart from the problematic justification for such a [rule], there are considerable practical problems with trying to wrest from a complex series

of events all and only the evidence that hurts the plaintiff.")

In each of the circuit cases discussed above, a narrow "at the moment" analysis considering only the officers' perceptions of the civilian's conduct would have required the courts to find that the officers acted reasonably. But circuit courts have refused to sanction such absurd results. The real-life scenarios they have considered make clear that the "totality of the circumstances" test must include consideration of both parties' conduct prior to the use of force in order to accurately evaluate whether an officer's use of force was objectively reasonable.

IV. BEST PRACTICES IN POLICE USE OF FORCE TAKE A "TOTALITY" APPROACH.

Petitioners' proposed Fourth Amendment standard contradicts not only precedent from this Court and the courts of appeals, but the collective wisdom of policing experts and law enforcement agencies themselves. The Court has previously looked to existing police practice to guide its analysis of excessive force. *See Garner*, 471 U.S. at 10-11, 18 (citing polices on use of deadly force against nonviolent suspects in holding shooting of fleeing suspect unreasonable). This is particularly appropriate because the Fourth Amendment examines a use of force from the perspective of a "reasonable officer," which necessarily accounts for the policies and training to which officers are subject. *See Graham*, 490 U.S. at 396. Here, those practices reinforce a rule that considers not only the officer's action at the moment he pulls the trigger, but also

any conduct that may have unreasonably provoked the threat in the first place.

Best police practices, reflected in recommendations of police organizations and the policies of leading agencies, establish that police departments cannot adequately address use of force simply by training officers to fire a gun at the moment a threat arises. Rather, an officer's best chance of performing his duties safely is to behave reasonably during all phases of an incident, deploying sound, considered tactics that de-escalate the situation and avoid the need for force when possible. For an agency to ignore all preceding officer conduct that gives rise to threats to the safety of officers or others would be neither reasonable nor safe.

Law enforcement experts thus urge police departments to consider an officer's tactics when evaluating the reasonableness of the officer's use of force. Specifically, best practices encourage officers to "slow down," "create space," and employ "de-escalation" techniques, because such tactics provide officers an opportunity to consider alternative courses of conduct that are safer for both the officers and the subjects with whom they engage. For the same reasons, experts urge supervising officers to hold their subordinates accountable for failing to consider these tactics in any situation involving potential use of force.

A consensus report recently issued by eleven of the most significant law enforcement leadership and labor organizations in the nation recommends that officers "shall use de-escalation techniques and other alternatives to higher levels of force . . . whenever

possible and appropriate before resorting to force and to reduce the need for force," and calls for regular training on de-escalation.[7] As the Police Executive Research Forum ("PERF") explains, policies that prioritize de-escalation, sound tactics, and the sanctity of human life—and hold officers accountable for adhering to these tenets—"are designed to keep officers out of harm's way. . . . Teaching officers to 'slow down' some situations can help them avoid reaching a point where they or members of the public become endangered and officers have no choice but to use deadly force."[8]

The President's Task Force on 21st Century Policing also encourages agencies to provide use of force training that emphasizes that "sometimes the best tactic . . . is to step back, call for assistance, de-escalate, and perhaps plan a different enforcement action that can be taken more safely later."[9]

PERF has characterized this "comprehensive evaluation by the officer of the *need* for force" as consistent with the "totality" standard articulated by

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[7] *National Consensus Policy on Use of Force* 3 (Jan. 2017), available at http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf.

[8] Police Executive Research Forum, *Critical Issues in Policing Series: Guiding Principles on Use of Force* 22 (March 2016), *available at* http://www.policeforum.org/assets/guidingprinciples1.pdf.

[9] *Final Report of the President's Task Force on 21st Century Policing*, Department of Justice Office of Community Oriented Policing Services 20-21 (May 2015) (internal quotation omitted), *available at* https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

this Court in *Graham*.[10] In addition, based on feedback at a series of national policing conferences, PERF observed that police agencies assessing whether a use of force complies with policy should look not just to the moment of the shooting, but to the officer's conduct that led up to the use of force:

> [T]here is a growing recognition in the policing profession that a review of an officer's use of force should not focus solely on the moment that the officer fired a gun or otherwise used force. Instead, leading police chiefs are saying that the review should cover what led up to the incident, and officers should be held accountable if they failed to de-escalate the situation in order to prevent it from ever reaching the point where the use of force was necessary.

Id. at 9.

Accordingly, law enforcement agencies increasingly emphasize avoiding the need to use force, training on de-escalation, and considering tactics leading up to a use of force in evaluating shootings and other incidents. For example, departmental policies in Albuquerque, Baltimore, Cincinnati, Cleveland, Dallas, Los Angeles, New Orleans, New York City, Newark, and Seattle—to name just a few—direct officers to avoid creating

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[10] *See* PERF, *Critical Issues in Policing Series: Re-engineering Training on Police Use of Force* 9-10 (Aug. 2015) (emphasis added), *available at* http://www.policeforum.org/assets/reengineeringtraining1.pdf.

danger and consider alternatives before introducing force into a situation, and likewise direct supervisors to evaluate whether officers adhered to these policies.[11]

The language used in several of these policies illustrates the "totality" perspective officers are expected to employ when evaluating a potential use

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[11] *See* Albuquerque Police Department, Procedural Order 2-52 at 4, 6, 7, 12–13 (Apr. 2016), *available at* https://sflinks.cabq.gov/THyzJgCi2vU/2-52%20-%20Use%20of%20Force.pdf; Baltimore Police Department, Policy 1115 at 1, 4, 10, 13 (July 2016), *available at* http://www.baltimorepolice.org/sites/default/files/policies-and-procedures/1115_Use_Of_Force.pdf; Cincinnati Police Department, Policy 12.545 at 7, 8, 17 (Feb. 2017), *available at* http://cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf; Cleveland Police Department, Policy 2.1.02 at 4–5 (Aug. 2014), *available at* http://www.city.cleveland.oh.us/sites/default/files/forms_publications/GPO_Book11-24-15.pdf; Dallas Police Department, General Order 906 (June 2015), *available at* http://www.dallaspolice.net/reports/Shared%20Documents/General-Order-906.pdf; Los Angeles Police Department Manual, Vol. 1, Section 556.10, "Use of Force" (2015), *available at* http://www.lapdonline.org/lapd_manual/volume_1.htm; New Orleans Police Department Operations Manual, Chapter 1.3: Use of Force, at 5, 8 (Dec. 2015), *available at* http://www.nola.gov/getattachment/NOPD/ NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/; New York City Police Department, Force Guidelines at 1–2 (June 2016), *available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf; Newark Police Department, General Order 63-2, "Use of Force By Police Officers" 1, 4, 8, 11–12 (Mar. 2013), *available at* http://ow.ly/LkoQ309eKuK; Seattle Police Department Manual, Policies 8.000, 8.100, 8.500 (Sept. 2015), *available at* http://www.seattle.gov/police-manual/title-8.

of force situation, as well as the officer safety rationale. The Seattle Police Department, for instance, instructs:

> Officers should recognize that their conduct prior to the use of force, including the display of a weapon, may be a factor which can influence the level of force necessary in a given situation. . . . Officers should take reasonable care that their actions do not precipitate an unnecessary, unreasonable, or disproportionate use of force, by placing themselves or others in jeopardy, or by not following policy or training.

Seattle Police Department Manual, Policy 8.000, *supra* note 10.

Similarly, the New Orleans Police Department requires that:

> Officers shall perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others through the use of poor tactical decisions. ... When feasible based on the circumstances, officers will use de-escalation techniques, disengagement; area containment; surveillance; waiting out a subject; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety.

New Orleans Police Department Operations Manual, Ch. 1.3: Use of Force, *supra* note 10, at 5.

As these best practices and policies illustrate, the police themselves recognize that the best opportunity to avoid and minimize use of force arises in the officers' conduct before force is used, through tools including de-escalation, containment, and use of time and space. Petitioners' rule would prohibit courts from considering these tools—tools that police themselves recognize as vital—when evaluating the reasonableness of officers' actions. The Court's "totality of the circumstances" approach is consistent with that teaching; Petitioners' cramped approach is not.[12]

V. CONSIDERING AN OFFICER'S CONDUCT LEADING UP TO A USE OF FORCE WOULD NEITHER OPEN FLOODGATES OF OFFICER LIABILITY NOR EXPOSE OFFICERS TO HEIGHTENED SAFETY RISKS.

Under the "totality" analysis, an officer may incur liability only when his unreasonable conduct

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[12]Notably, the *amicus* brief of California State Sheriff's Association, California Police Chiefs' Association and California Peace Officers' Association does not argue that courts assessing a use of force should never consider officers' conduct in the preceding moments. Instead, their brief emphasizes that officers should not be held liable for reasonable uses of force, that a suspect's actions may be an intervening cause that negates liability, and that liability should be based on an officer's reckless or intentional conduct rather than mere negligence — all arguments that are consistent with the Court's "totality" analysis.

directly causes the need to use force that would have been avoided. Such an approach does not expose officers to undue financial risk, as a number of safeguards continue to protect against unwarranted findings of liability.

A. Under Applicable Tort Principles, The Doctrine Of Proximate Cause Precludes Far-Reaching Liability.

A comprehensive use of force analysis is consistent with tort law principles undergirding this Court's analysis of constitutional torts. This Court has recognized "claims brought pursuant to § 1983 sound in tort. . . . and [has] interpreted the statute in light of the 'background of tort liability.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-10 (1999) (internal citations omitted). Central to this background is the recognition that "tort liability . . . makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

The foundational tort requirement of proximate causation protects an officer against liability for tactics that may be unreasonable but do not proximately cause the ultimate use of force. *See, e.g.*, Restatement (Second) of Torts §§ 431 (2016). Even if an officer engages in unreasonable conduct, he is not automatically liable for all the harm that his actions may have caused in the "but for" sense. *Id.* Rather, a subject's own conduct can break the chain of causation–and thereby liability–if it constitutes a superseding act that creates the justification for an officer's use of force. *See, e.g.*, Restatement (Second) of Torts §§ 440-453 (2016); *Brower*, 489 U.S. at 599.

Courts recognize that when a subject's own conduct breaks the chain of causation, becoming a superseding cause of the need for force, that fact is a critical part of the "totality" analysis that precludes liability. In *Herbert v. Wilbur*, 34 F. App'x 828, 830 (3d Cir. 2002), for example, the Third Circuit considered the actions of an officer who approached a stolen car stopped at an intersection, tried to pull a passenger out of the backseat, got stuck in the door, was dragged at high speed, and subsequently killed an occupant when he used deadly force to stop the car. *Id.* at 830-31. The court concluded that "even if [the officer] violated the Fourth Amendment when he struggled to pull [the decedent] out of the backseat" the driver's act of "dragging him along the pavement at speeds up to 70 miles per hour, . . . was a superseding cause that appropriately cuts off [his] liability with respect to his use of deadly force in self-defense." *Id.* at 830. *See also Lamont v. New Jersey*, 637 F.3d 177, 185-186 (3d Cir. 2011) (even if officer's pursuit of a subject into the woods was unreasonable, subject's "noncompliant, threatening conduct in the woods was a superseding cause that served to break the chain of causation" prior to the shooting); *James v. Chavez*, 2013 WL 600227, 511 Fed. Appx. 742, 750-751 (10th Cir. 2013) (subject's attempt to stab an officer was superseding cause of his shooting, even if officer's decision to send in SWAT team was unreasonable); *Troupe v. Sarasota County, Fla.*, 419 F.3d 1160, 1164-66 (11th Cir. 2005) (subject's decision to drive off the road at high speed to avoid capture was an intervening cause of crash injuries, even though officer shot at the fleeing car); *Hundley v. District of Columbia*, 494 F.3d 1097, 1104-05 (D.C. Cir. 2007) (off-duty officer's negligent vehicle stop did

not proximately cause his shooting of subject, when subject lunged at officer after he identified himself as police).

The hypothetical Petitioners offer to argue that permitting proximate cause liability puts officers' lives in danger, however "spine-tingling," is ultimately unpersuasive. *See* Pet. Br. at 35-36. In the hypothetical, originally crafted by then-Judge Alito in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), three officers fail to knock and announce themselves prior to entering a residence, but they have a warrant, show that warrant to the resident, and identify themselves as police before the suspect draws a gun, shoots two of them, and turns the gun on the third. *Id.* Petitioners contend that, under the provocation rule, the third officer would be forbidden, upon pain of liability, from using force to protect his own life due to their failure to knock and announce themselves.

This conclusion rings false, as the necessity to shoot the subject is clearly not precipitated by the officers' failure to knock and announce—which they cured by identifying themselves—but by the subject's superseding act of attacking the officers. The subject's conduct in attacking individuals he knows to be police officers acting pursuant to a warrant breaks the chain of causation between the unreasonable tactic of entering unannounced and the need to use force in self-defense. Indeed, the Third Circuit concluded as much in a sentence omitted by Petitioners, explaining that on such facts "the suspect's conduct would constitute a 'superseding' cause that would limit the officer's liability." *Bodine*, 72 F.3d at 400 (internal citation omitted).

Accordingly, the concept of proximate cause would ensure that neither the provocation rule nor a "totality" analysis would permit liability in such a situation.

B. Qualified Immunity Protects Officers On A "Totality" Approach.

Under a "totality" approach that includes consideration of an officer's conduct leading up to the use of force, officers also remain protected by the shield of qualified immunity. If an officer engages in an unreasonably reckless course of conduct that prompts an avoidable application of force, and it is deemed excessive force, qualified immunity ensures he will be held liable only if it was clearly established at the time that his course of conduct was unreasonable under the totality of the circumstances. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (calling qualified immunity "objective (albeit fact-specific)"). The very purpose of qualified immunity is to ensure that officers will not incur liability for reasonable mistakes—or be forced to second-guess themselves in a dangerous situation for financial reasons. Qualified immunity still operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201; *see also White*, 137 S. Ct. at 552 (officer entitled to qualified immunity for firing without warning after late arrival to shooting scene).

C. A "Totality" Rule Holds Officers Liable Only for Unreasonable Conduct.

Petitioners distort the meaning of the totality approach when they argue that it will lead courts to "hold[ ] officers liable for reasonable use of force" and claim that such an approach "forc[es] [officers] to hesitate and reassess all their conduct while making split-second life-or-death decisions, and, worse, compel[s] them to make the wrong decision on threat of crushing liability[.]" *See* Pet. Br. at 36. Nothing in the totality approach alters the limitation, inherent in the Fourth Amendment itself, that only *unreasonable* seizures violate the Constitution. U.S. Const. amend IV; *see Graham*, 490 U.S. at 394. An analysis that considers the full course of an officer's conduct prior to the moment of force does not use a different standard. Even under the totality analysis, officers cannot be held liable for simply making mistakes, sub-optimal choices, or even negligent decisions, but only for those uses of force that—in light of the totality of the circumstances, including the officers' own prior conduct—are judged to be unconstitutionally unreasonable.

CONCLUSION

For the reasons stated above, this Court should reject Petitioners' attempt to limit the analysis of use of force under the Fourth Amendment to consideration of the officer's conduct only at the precise moment force was applied, and should reaffirm that the governing "totality of the circumstances" approach determines the reasonableness of an officer's use of force based on

any relevant facts, including the officer's conduct in the moments before that proximately causes the use of force.

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Dated: February 23, 2017

RECORD AND BRIEFS

No. 16-369

FILED
JAN 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETTTIONERS

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TO THE HONORABLE CHIEF JUSTICE John G. Roberts, Jr. and HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Amici Curiae are the California State Sheriffs' Association, the California Police Chiefs' Association and the California Peace Officers' Association (collectively "*Amici Curiae*").[1] *Amici Curiae* respectfully submit the following brief in support of Petitioners, County of Los Angeles, Christopher Conley and Jennifer Pederson, in accordance with consent to this brief provided by all parties.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

Amici Curiae are the above Associations, whose members make up a vast array of law enforcement officers throughout the State of California. *Amici* Members represent policy making officials, management,

[1] The parties were notified at least ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief and have filed blanket consents for that purpose.

No party or counsel for a party authored this brief, in whole or in part. No person or entity other than *Amici Curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

and rank and file officers, providing a broad spectrum of law enforcement viewpoints.

I. California State Sheriffs' Association

The California State Sheriffs' Association ("CSSA") is a nonprofit professional organization that represents each of the fifty-eight (58) California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

II. California Police Chiefs' Association

The California Police Chiefs' Association ("CPCA") represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

III. California Peace Officers' Association

The California Peace Officers' Association ("CPOA") represents more than 3,000 members, who are peace officers of all ranks, throughout the State of California,

from municipal, county, state, and federal law enforcement agencies. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

IV. *Amici Curiae* Interests in This Matter

This case raises important issues for *Amici Curiae*, in that it will determine critical issues applicable to officer safety, law enforcement use of force, and the liability of officers for the use of force. Municipalities and Counties represented by the members of *Amici* are interested in the outcome in this matter because it has the potential to negatively impact officer safety and qualified immunity for individual officers for the use of force. Local law enforcement officers are engaged in the primary activity of combating crimes and, frequently, encountering dangerous situations and individuals. Their conduct is guided by this Court's pronouncements and their day-to-day lives in the field are directly impacted by such decisions.

Since *Amici* represent the interests of a wide variety of law enforcement, *Amici* provide this Court with a valuable perspective into the potential adverse effects of the Ninth Circuit opinion in this matter. The underlying use of force principles at issue impact important public safety concerns that are critical at all levels of law enforcement.

Given the significant ramifications of the Ninth Circuit's opinion, *Amici* respectfully submit this brief

in support of Petitioners. *Amici*'s independent perspective on the issues presented by the underlying opinion takes into account, in particular, the fact that the members of *Amici* will be tasked with the actual implementation in the field of the legal principles that this Court will determine in this matter.

SUMMARY OF THE ARGUMENT

This Court has granted review on the following issue pertinent to *Amici*:

> 3. Whether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case, as to the underlying facts in this matter. (Brief for Petitioners ("PB"), at 4). *Amici*, however, wish to emphasize several facts of particular note. Specifically, there is some dispute in the deputies' accounts regarding what information was actually known about individuals residing in the backyard of the property that was being searched for the wanted, felony, parolee. (PB, at 5). Despite the Ninth Circuit's confidence that at least one of

the deputies received information that there were individuals living in the backyard, this does not, in fact, appear to be a settled point. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1185 (9th Cir. 2016).

At least two other observations were made by deputies during this incident that were both undisputed and which confirmed information known to them about the whereabouts of the wanted, felony parolee. First, there was a bicycle in the front yard of the house they searched. (PB, at 5). The deputies had received a tip from an informant that the parolee had been seen in front of the house on a bicycle. (PB, at 5). Second, when the deputies knocked at the main residence and were talking through the door with the resident, they heard someone running to the back of the house. (PB, at 5-6). Based upon the circumstances and information provided to them, the deputies reasonably believed the person running to the back of the house was the wanted parolee for whom the deputies had an arrest warrant. (PB, at 5-6).

Several deputies entered a side gate and proceeded to the backyard to clear and secure the rear of the residence, for the deputies' safety. (PB, at 5). There, the deputies searched several storage sheds, before opening the makeshift shack in which Respondents were residing. (PB, at 6-7); *Mendez*, 815 F.3d at 1185.

Despite the Ninth Circuit's agreement with the District Court's finding that "deputies here should have been aware that the shack in the backyard was being used as a separate residence," there is nothing

particularly distinctive about the shack, as compared to the other sheds in the backyard, which would reasonably lead to that conclusion. (PB, at 7-8). Indeed, although the Ninth Circuit emphasized that the deputies should have noted that "the shack itself was surrounded by an air conditioning unit," for instance, this unit was "on the opposite side of the shack, and therefore not visible to the Deputies." (PB, at 7); *Mendez*, 815 F.3d at 1193.

NINTH CIRCUIT FINDINGS

The Ninth Circuit determined two primary issues – whether there was an unlawful search of the residence and shack, and whether there was an unlawful entry into the shack. *Mendez*, 815 F.3d at 1187-1188. First, the Ninth Circuit considered whether there has been an unlawful search of the residential premises, including the shack. The deputies had not obtained a search warrant for the premises. However, the deputies argued various exceptions to the warrant requirement – none of which the Ninth Circuit found had any merit. The Ninth Circuit concluded that there was no exigency justifying the search. *Id.* at 1190. The Court further rejected the notion that a protective sweep of the premises was justified here. Instead, the Court found that "[f]or the same reasons that exigent circumstances did not justify entry into the shack, . . . the deputies did not have the requisite suspicion of danger to

justify a protective sweep." *Id.* at 1191. Therefore, according to the Court, the search of the shack by the deputies was a violation of clearly established law. *Id.*

Second as to the deputies' failure to knock and announce before entering the shack, the Court found that the law was *not* clearly established in this regard. *Id.* Specifically, "officers are not required to knock and announce 'at each additional point of entry into structures within the curtilage.'" *Id.* at 1192 (quoting *United States v. Villanueva Magallon*, 43 F. App'x 16 (9th Cir. 2002)). Since officers had already knocked and announced at the main house on the property, before entering the shack, the Court held that it was not clearly established law that deputies would again need to knock and announce at the shack. Although the Court concluded that the deputies here were entitled to qualified immunity on this point, the Court nevertheless held that, prospectively, "officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house."[2] *Id.* at 1192-1193.

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[2] Of course, this point seems to be in dispute, as noted in Part III, *supra*. Given the discrepancies about what deputies knew about the shack and whether there were residents therein, and the fact that features of the shack did *not* seem to reasonably reveal to deputies that it was being used as a residence, the Ninth Circuit's conclusion here that the responding deputies should have known the shack was being used as a residence seems inequitable.

ARGUMENT

I. Introduction.

There is no question here that the circumstances of this case are unfortunate for Respondents. As Petitioners aptly state: "It was a tragic happenstance." (PB, at 2). However, law enforcement officers protect the public safety and put themselves in harm's way daily, and must react in the field to very rapidly evolving circumstances; they should not be held liable for unlucky circumstances. This is particularly true, as here, where the Ninth Circuit concluded that officers were entitled, at least in part, to qualified immunity, and that their use of force was expressly found to be *reasonable*.

Amici are particularly concerned that, increasingly, officers are held to a standard that does not honor this Court's demand that officers' actions must *not* be viewed with 20/20 hindsight from the calm safety of a courtroom. It cannot be gainsaid that officers' actions must be viewed through the lens of their viewpoint in the heat of the moment. Given that viewpoint, photographs of the area deputies were attempting to secure and, in particular, their viewpoint of the shack that was being briefly searched reveal that the deputies' reasonable expectation was that the shack was not in fact a dwelling. (Joint Appendix ("JA"), at 76-82). It was merely being cleared as a potential hiding place for the felony parolee, who was considered armed and dangerous, for whom they were searching.

II. Relevant Law.

The Ninth Circuit set forth a standard for the review of use of force by peace officers when there has been an unlawful entry into an individual's residence. In *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), the Ninth Circuit evaluated a claim by officers to qualified immunity for their use of force. In *Alexander*, officers had assisted county health officials in serving an inspection warrant at a home, which ultimately included an order permitting forcible entry. The homeowner's door was nailed shut and he threatened officers that he would use a gun against them at the time of execution of the warrant. *Id.* at 1358. A standoff ensued and officers developed a plan to forcibly break into the home and take the man into custody. When they did so, he pointed a gun at officers and shot twice, although the gun misfired. Officers returned fire, and the homeowner died.

The plaintiff in *Alexander* claimed that the officers "used excessive force in creating the situation which caused [the homeowner] to take the actions he did." *Id.* at 1366. The Court found that the application of qualified immunity turned on the subjective belief of the officers – whether their intent in entering the house was for the unlawful purpose of arresting the homeowner, as opposed to the lawful purpose of keeping the premises safe while health inspectors executed the inspection warrant. *Id.* at 1364.

The Ninth Circuit later characterized its holding in *Alexander* thusly:

> We held that if the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting the man – even though they reasonably shot him at the moment of the shooting – because they "used excessive force in creating the situation which caused [the man] to take the actions he did."

Billington v. Smith, 292 F.3d 1177, 1188 (9th Cir. 2002) (changes in original).

In *Billington*, the Ninth Circuit reconsidered its broader determination in *Alexander*:

> We read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.

Id. at 1189.

In *Duran v. City of Maywood*, the Ninth Circuit characterized the rule in *Alexander* as relating to the situation "when there is evidence that a police officer's use of excessive and unreasonable force caused an *escalation* of events that led to the plaintiff's injury." *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (emphasis added). In *Duran*, "officers walked up the [residential] driveway with guns drawn and never announced their presence." *Id.* at 1131. The plaintiffs in *Duran* argued that this was a "'stealth' approach [which] 'raised the likelihood' that 'whomever they surprised would point a gun at them.'" The court found, however, that the officers had arrived in marked police cars, were in uniform, did have their guns drawn while approaching the residence up the driveway in front of the house, but, ultimately, that "these actions were entirely reasonable given that they were responding to a call that shots had been fired." *Id.*

In light of this evidence, the court concluded that there was "nothing about these actions [that] should have *provoked* an armed response." *Id.* (emphasis added). Indeed, in order for the principle of *Alexander* to apply, the court explicitly noted that "there must be evidence to show that the officer's actions were *excessive* and *unreasonable*, and that these actions caused an *escalation* that led to the shooting." *Id.* (emphasis added).

Most critically, the *Billington* court held that the reasonableness of officers' use of deadly force will depend "on whether their '*reckless or deliberate* conduct during the seizure unreasonably created the need to

use such force,' where such conduct was 'immediately connected to the suspect's threat of force.'" *Id.* at 1186 (emphasis added). Thus, even a "reasonable use of force is unreasonable if the officer *recklessly* got himself into the situation." *Id.* at 1186 (emphasis added).

As limited then, there must be "intentional or reckless conduct rather than mere negligence" in the actions of officers. *Id.* at 1191. A plaintiff cannot merely show that there were "tactical errors" made by law enforcement, i.e., "that no reasonable officer would have used [the officers' tactics]." *Id.* at 1187 (citing *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001)). There must, instead, be at least *reckless* conduct on the part of officers in creating the need for the use of force.

Indeed, the court in *Billington* recognized that "the fact than an officer *negligently* gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself." *Id.* at 1190. "[*N*]*egligent* acts do not incur constitutional liability." *Id.* (emphasis added). In other words, "even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation." *Id.*

In *Billington*, the court found that force was justified against an individual who was resisting arrest and engaged in hand-to-hand combat with an officer. *Id.* at 1185. However, the man's estate claimed that the officer had made numerous tactical errors which landed him in the situation of being engaged in such combat

with the deceased. *Id.* at 1185-1186. However, the court found that it is insufficient for a party to show merely expert disagreement with an officer's actions. "Rather, the court must decide as a matter of law 'whether a reasonable officer could have believed that his conduct was justified.'" *Id.* at 1189. In *Billington*, the officer's purported failure to wait for backup or take precautions against being compromised in his confrontation with the motorist, among other officer decisions, "could [not] be deemed intentional or reckless, much less unconstitutional, provocations that caused [the motorist] to attack [the officer]." *Id.* at 1191.

This Court previously questioned the validity of "[t]he Ninth Circuit's 'provocation' rule," which it noted "has been sharply questioned elsewhere." *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777, n. 4 (2015) (citing *Livermore v. Lubelan*, 476 F.3d 397, 406-407 (6th Cir. 2007); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001)). Although this Court noted that its "citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them," the Court notably still found that, even if this rule were a valid one, there was no need to apply it for purposes of this Court's qualified immunity analysis. *Id.* The only question that mattered to this Court for that analysis was whether there was a clearly established constitutional right that was violated by the officers. *Id.*

In stating the general rule of qualified immunity, this Court reiterated that "[p]ublic officials are immune from suit under 42 U.S.C. § 1983 unless they

have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *Id.* at 1774 (quoting *Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (2014)). This Court found that there was no consensus of clearly established law which required officers to accommodate an individual's mental disability.

In *Sheehan*, officers were attempting to assist a social worker to take a mentally unstable woman into temporary protective custody; they entered her residence and shot her because she was wielding a knife. This Court specifically noted that, even "[u]nder Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction." *Id.* at 1777 (citing *Billington v. Smith*, 292 F.3d 1177, 1189-1190 (9th Cir. 2002)).

The Third Circuit Court of Appeals has recognized that theories of "common law proximate causation" have been applied in the context of claims under 42 U.S.C. § 1983. *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000). In discussing its prior opinion in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), the *Watt* court explained that even an "illegal entry did not make the officers automatically liable for any injuries caused by the arrest." *Watt*, 235 F.3d at 160. In "[i]nvoking proximate causation" principles, the Third Circuit "explained that if the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an *intervening cause* that limited the officers' liability." *Id.* In order to

recover damages, a plaintiff would have "to prove two torts – one for the illegal entry and a second for excessive force."

III. There Can Be No Liability for Officers' Use of Force When There is an Intervening Event, and Officers Have Qualified Immunity.

In synthesizing the above legal principles, several key concepts pertinent to the analysis here become clear. First, the "provocation rule" that has been utilized and circumscribed by the Ninth Circuit explicitly requires that there be *intentional* or *reckless* conduct on the part of officers, which conduct provokes a violent reaction or confrontation. Officers' conduct must *escalate* the situation, such that an individual is directly reacting to officers' unlawful or unjustified intrusion.

The facts in this action seem more akin to those in *Duran*, where officers were approaching a house in uniform, but with guns drawn, and were fired upon. The fact that those actions might surprise a resident was insufficient to render them intentionally or recklessly provoking such a reaction.

Moreover, given the totality of the circumstances, one cannot conclude so easily that officers were reckless merely because they did not obtain a warrant. The Ninth Circuit seems to conclude that, because it has determined that officers were required to have a search warrant for the premises, that this means that

the deputies' actions were naturally "reckless." However, given the chain of events – namely the existence of an arrest warrant for a parolee, indicia of his presence at the property, the resident's consent to search the home, the need to secure the rear of the house while it was being searched, the chaotic surroundings of the rear yard, and the very ambiguous nature of the shack that needed to be cleared – all lead to the conclusion that the deputies' actions in briefly opening the shack was not a reckless action for which they can be held liable.

Second, it is notable that the Ninth Circuit surmised that "here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." *Mendez*, 815 F.3d at 1193. In essence, the Ninth Circuit found, utilizing hindsight 20/20 vision, that it was the deputies' failure to knock and announce which caused the result here. However, the Court found *no* responsibility on the part of the deputies for that failure. The Court found that the deputies were entitled to qualified immunity on that point, since the law was not clearly established that the deputies had to knock and announce separately at a structure apart from the main residence, where they had already knocked and announced.

Finally, the Third Circuit in *Watt* emphasized that even an *illegal* entry does not automatically result in officer liability. Instead, the actions of individuals can

be viewed as an *intervening cause* that limits officer liability. Where by accident, Mr. Mendez was moving his gun at the time that officers peered inside the shack, deputies cannot be held responsible for this unfortunate coincidence.

The Ninth Circuit finds fault in this distinction because an individual who "intentionally pointed a weapon" "would ostensibly be entitled to damages," "but here he would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police." *Mendez*, 815 F.3d at 1194. This apparent incongruity presumes the wrong viewpoint, however. As set forth above, the "provocation rule" is concerned with the officer's conduct; it must be intentional or reckless in creating a situation where those actions *should* have *provoked* an *armed* or *violent* response. Here, there cannot be said to have been any such conduct, or any such response. Instead, the coincidental and unfortunate actions of Mr. Mendez in the shack, which was not a response directly provoked by the officers here, must instead be viewed by this Court as an intervening event which limits officer liability, not supports it. Any other result simply opens officers up to mere negligence or standard tort liability, and undermines the qualified immunity principles that protect officers reacting reasonably in the field to rapidly evolving, dangerous situations.

IV. The Ninth Circuit's Opinion Jeopardizes Officer Safety.

From *Amici*'s perspective, however, and more important than the officer liability repercussions of the Ninth Circuit's holding below, are the negative officer safety implications of the Ninth Circuit's decision. The decision below further erodes this Court's prior determination in the seminal case of *Graham v. Connor*, 490 U.S. 386 (1989), that an officer's actions must be judged by a court through the viewpoint of a reasonable officer involved in the particular incident and without the benefit of the 20/20 vision of hindsight. The Ninth Circuit's opinion will have the inexorable effect of causing officers involved in rapidly evolving and dangerous circumstances to second guess each action they are about to take leading up to an encounter with a suspect, for fear of subjecting themselves to potentially devastating financial liability. With second guessing comes hesitation. Hesitation, in turn, could lead to tragic, life-ending results for a law enforcement officer who is confronted, as here, by an individual who appears to be armed with a firearm and pointing that weapon directly at the officer.

This Court has recognized on numerous occasions that law enforcement officers must be able to act in their roles as protectors of the public safety with some degree of latitude. Officers' actions need not be perfect, but they must be reasonable under the totality of the circumstances confronting them when they determine that they must use force to protect themselves, citizens

at large or to take a person into custody at the time they utilize that force.

This principle has been embedded in Fourth Amendment jurisprudence since *Graham v. Connor*. The Ninth Circuit's decision here impermissibly undermines that notion and, instead, places law enforcement officers in the position of focusing on the details leading up to the instant when they are compelled to utilize force for a legitimate law enforcement purpose. In other words, the Ninth Circuit's application of its provocation doctrine forces officers to focus their attention on matters that, quite frankly, could get them killed or seriously injured rather than on the circumstances immediately confronting them.

The facts of this case amply illustrate the impossible choice to which the deputies were put under the provocation doctrine. On the one hand, they faced the Scylla of being shot by the apparently armed and threatening Mr. Mendez when they peered inside the shack in which it was later determined Mr. Mendez resided. On the other hand, they faced the Charybdis of substantial legal liability for their actions in failing to knock and announce their presence at the entry of a structure that could have been nothing more than another storage shed in the backyard of a residence where they had already obtained permission to search. In either event, law enforcement loses when placed in the untenable position of decision making while serving the public under the Ninth Circuit's provocation doctrine.

CONCLUSION

Amici contend that officers must be permitted to use reasonable force in protecting themselves, even when they may make errors in the execution of their duties. Qualified immunity protects officers as to such reasonable use of force.

As the Ninth Circuit found here, the force used by the involved deputies was reasonable. Indisputably, they were staring down the barrel of a gun inside a shack that did not reflect, on the outside, its use as a dwelling. The coincidental actions of Mr. Mendez in moving the gun toward the deputies at the time they looked into the shack must be found to be an intervening act that precludes a finding of liability against the deputies.

For all of the foregoing reasons, *Amici* urge this Court to reject the provocation doctrine articulated by the Ninth Circuit because it does not comply with settled Fourth Amendment jurisprudence and significantly impairs officer safety.

Dated: January 24, 2017

Respectfully submitted,

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FILED
FEB 22 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-369

IN THE
Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,
Petitioners,

v.

ANGEL MENDEZ, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE FOR THE GEORGETOWN UNIVERSITY LAW CENTER CHAPTER OF THE BLACK LAW STUDENTS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Black Law Students Association (BLSA) at the Georgetown University Law Center submits this brief as amicus curiae in support of Respondents, urging this Court to affirm the ruling of the United States Court of Appeals for the Ninth Circuit. BLSA is a student run hub for activism and community engagement amongst black law students. BLSA consists of hundreds of current law students and alumni who are dedicated to service, scholarship, and social justice. BLSA has a direct interest in the development of jurisprudence which counters systemic incentives for abuses by law enforcement against members of their community. Consequently, BLSA has a meaningful interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

In the last four years alone, millions of people watched police officers place a black man in a chokehold until he died, an officer gun down a 12-year-old black boy moments after he arrived on the scene of a playground as the boy played with a toy gun, and another officer shoot a middle-aged black man in the back as he fled after a minor traffic

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[1] Pursuant to this Court's Rule 37, this brief is filed with the consent of all parties. Petitioners' consent letter is on file with the Court. Respondents' consent letter is included with the filing of this brief. This brief was not authored in whole or in part by counsel for any party and no person or entity other than Amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

stop. The fact that police officers sometimes commit horrific acts of brutality is nothing new. Poor people and people of color—the disproportionate victims of police violence—have never harbored the illusion that "these sorts of things do not happen here." What is new, perhaps in part because these acts are now on the Internet for all the world to see, are calls for reform including racial diversity programs, sensitivity training, body cameras, and demilitarization. However, the belief that these measures will eliminate racialized police violence misses an important point: the frequency and seeming impunity with which police wield violence is inseparable from this Court's Fourth Amendment doctrine. The doctrine provides that reasonableness of excessive force is analyzed purely from the point of view of the officer, and the qualified immunity defense excuses all manner of excessive force because supposedly every police interaction is a unique, in-the-moment event that has never been litigated or resolved.

With such indeterminate limits on state-sponsored violence against civilians, officers are free to test the bounds of their authority. The legitimization of the "shoot first, ask questions later" approach to law enforcement is most often levied against marginalized groups, particularly minorities in over-policed communities. Communities have accordingly grown distrustful of law enforcement. That distrust coupled with fear of those bound to protect and serve shapes how individuals respond to the very presence of law enforcement. Thus, while uncertainty in the excessive force doctrine under the Fourth

Amendment—compounded by the qualified immunity analysis—allows increasing deference to law enforcement, society's understanding of the limit on police power is warped.

If there is to be a meaningful limit on police power it must necessarily be informed by reasonable civilians as well as reasonable officers. We must ask ourselves what level of force are reasonable civilians willing to condone against themselves and under what conditions do even reasonable officers exceed that authorization. In assessing the reasonableness of an officer's use of force, the Court should step into the victim's shoes to rebalance the societal and governmental interests at play in law enforcement-community interactions. Particularly, the Court should reemphasize that the totality of circumstances analysis articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and its progeny includes a balancing of society's interest in freedom from a militarized police state.

ARGUMENT

In the name of law and order, we arm police with handcuffs, batons, electroshock devices, and guns, fully expecting that in interactions both routine and dangerous, they will serve the public and keep the peace without resorting to these violent tools of the trade. But, on occasion—and all too often when it comes to people of color—police wield these weapons, to hold, subdue, maim, and even kill. *Infra*, Part II.C. And when they do, the fundamental constitutional question determining whether the civilian victims or survivors of state-

sanctioned violence will receive any measure of justice is whether the police acted reasonably in placing a pedestrian in a chokehold, tear-gassing a protester, driving a speeding motorist off the road, lobbing stun grenades inside of a residence, or shooting a fleeing suspect in the back. *See, e.g.*, *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). To be sure, "[n]ot every push or shove" translates into a Fourth Amendment violation, but because we invest police with the awful power to inflict pain and even death, ultimately every use of police force, lethal or otherwise, must abide by the Fourth Amendment's reasonableness standard. *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

Weighing the reasonableness of an officer's conduct requires courts to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). In *Garner*, this Court initially acknowledged that in the context of deadly force "the intrusiveness of a seizure . . . is unmatched," and a "suspect's fundamental interest in his own life need not be elaborated upon." *Id.* However, over time the Court's Fourth Amendment jurisprudence has devolved to the point where the reasonableness standard seems to be analyzed exclusively from the perspective of law enforcement to the exclusion of all other considerations, including the viewpoint of the victims and the needs of the public. Indeed, for all of its outward complexity, today's Fourth Amendment jurisprudence on police use of force

fundamentally ignores the person on the receiving end of police violence.

I. In balancing the competing interests of individual liberty and effective law enforcement under the Fourth Amendment, courts have tipped the scale in favor of police use of force.

Since the initial balancing of society's interest in liberty and justice and the government's interest in effective law enforcement in *Garner*, courts have almost exclusively analyzed excessive force in a manner that rationalizes an officer's decision-making. Legitimizing an officer's inadvertent or intentional decision to cause grievous harm in a legal twilight zone immunizes officers from the consequences of even their unlawful actions.

A. Courts reviewing excessive use of force overwhelmingly defer to the officer's perception of danger.

The Court's language establishes a broadly deferential standard of review in excessive force cases that is limited to the officer's perception of danger. *See, e.g.*, *Saucier*, 533 U.S. at 205 (favoring "deference to the judgment of reasonable officers on the scene"); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968) ("The 'reasonableness' . . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."); *Garner*, 471 U.S. at 19 (recognizing the "practical difficulties" of assessing a suspect's

dangerousness). Indeed, the Court noted in *Graham* that officers need to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" about the requisite level of force needed in situation. 490 U.S. at 397. The Court subsequently decided that officers are allowed to make reasonable mistakes and use more force than necessary if the officer believed the suspect was likely to fight back. *Saucier*, 533 U.S. at 195.

From 2007 to 2016, the Court considered the use of deadly force in high speed car chases and not only condoned the use of deadly force against a fleeing suspect, but added that officers could shoot at a suspect "until the threat has ended." *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Plumhoff*, 134 S. Ct. at 2020; *Scott v. Harris*, 550 U.S. 372, 378–79 (2007). In response, lower courts may acknowledge the totality of the circumstances evaluation yet simultaneously dismiss an officer's role in creating the dangerous situation. *See, e.g.*, *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) ("[T]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis . . . ."); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). Framing the doctrine in terms of a reasonable officer makes the officer the sole credible witness in confrontations with civilians even when officers catalyze ensuing exigent circumstances.

B. The "clearly established law" standard of the qualified immunity defense excuses virtually all excessive use of force by analyzing every police interaction as a unique, in-the-moment event that has never been litigated and resolved.

The excessive force doctrine's failure to protect civilians' Fourth Amendment interests is grounded not just in the nearly blind deference afforded to officers in analyzing the reasonableness of their actions exclusively through the viewpoint of law enforcement, but also in the difficulty of determining what constitutes clearly established law to defeat a qualified immunity defense. *See* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 161 (2016). The twilight zone's complexity, unintentionally or otherwise, provides a broad basis for immunity and thereby facilitates justifications for an officer's infliction of harm.

In the first instance, the qualified immunity doctrine sets a high-bar for those wishing to bring suit against a government official. *See City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) ("This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"). Officials are entitled to qualified immunity unless his or her conduct violates clearly established constitutional or statutory law of which

every reasonable officer would have known. *See, e.g.*, *Mullenix*, 136 S. Ct. at 308. The Court has not required that prevailing precedent be directly on point but it does require a significant degree of particularity. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). In excessive force cases, the baseline constitutional standard provides that it is reasonable for an officer to use deadly force to prevent the escape of a suspect with a weapon or where there is probable cause to believe the suspect has threatened or inflicted serious physical harm. *Garner*, 471 U.S. at 12. In *Graham*, the Court elaborated on the factors lower courts should consider in determining reasonableness, including the severity of the crime, the immediacy of the threat, the suspect's resistance, and the potential for evasion. 490 U.S. at 396. Notwithstanding *Garner* and subsequent cases, the reasonableness standard continues to operate at a high level of generality. *See Pauly*, 137 S. Ct. at 552 ("Graham, Garner, and their Court of Appeals progeny . . . lay out excessive-force principles at only a general level."); *Plumhoff v. Rickard*, 134 S. Ct. at 2023 (reasserting that *Garner* and *Graham* are "cast at a high level of generality"). Most recently, the Court determined that lower courts must, at the very least, point to a case where officers in similar circumstances were held to have violated the Fourth Amendment. *Pauly*, 137 S. Ct. at 552.

However, the Court's application of the qualified immunity doctrine permits judges to evade the very question of whether the officer's conduct was unreasonably excessive. Unlike the "obvious" case in *Garner*, where the Court held it

was unreasonable to shoot an unarmed, fleeing burglary suspect, the Court has largely justified the use of deadly force by focusing on the distinctiveness of the circumstances without definitively indicating the outer limits of police authority. *See, e.g.*, *Pauly*, 137 S. Ct. at 552 (holding no clearly established law prohibited an officer, arriving late on the scene, from shooting the residents of a home because the ongoing police confrontation presented unique circumstances); *Sheehan*, 135 S. Ct. at 1775 (holding no clearly established law required officers to accommodate a mentally ill patient's disability and therefore the officers who shot the patient were entitled to qualified immunity); *Garner*, 471 U.S. at 19. For instance, if excessive force victims pursue a Fourth Amendment claim, courts may decide the constitutional question of whether an officer's infliction of harm was reasonable under the circumstances as a preliminary matter. *See Pearson v. Callahan*, 555 U.S. 223, 236, 242 (2009) (recognizing the Court's discretion to resolve a case on qualified immunity grounds without deciding whether a Fourth Amendment violation occurred). Alternatively, courts can resolve excessive force claims by determining whether the legality of a particular form and level of force was clearly established prior to the incident. *Id.* at 236. If the illegality of the police conduct was not clearly established, an officer would be entitled to a qualified immunity defense. The latter approach results in a lack of clear standards on what constitutes excessive force. Moreover, each inquiry rests on the viewpoint of an officer on the scene and

courts defer to the judgment of that officer in the event of uncertainty.

For example, some courts scrutinize "the moment" the officer decided to use potentially deadly force, to the exclusion of events preceding the incident. *See* Pet. for Writ. of Cert. 18–22. An officer's assertion that they "feared for their life" or "believed the suspect was armed" has acquired a talismanic quality, whereby recitation of fear for one's life has all but negated other factors in the totality of circumstances analysis. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1518 (2016) (discussing how an officer's assertion of feeling threatened "will often be enough to support the conclusion that the officer acted reasonably").

Alternatively, if officer safety is paramount, courts will amplify the "uniqueness" of the circumstances. But every case presents a unique set of circumstances. *See Pearson*, 555 U.S. at 242; Carbado, *supra*, at 1520–22 (discussing the difficulty in pinpointing clearly established law); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016) (noting that in sixteen of eighteen cases, the Court has held officers did not violate clearly established law and were entitled to qualified immunity without ruling on the constitutionality of the officer's conduct). The practical effect is that victims of excessive police force lack any adequate basis to maintain a civil action against an officer if a virtually identical case has not been litigated and resolved on appeal. *See* Carbado, *supra*, at 1522; Stephen R. Reinhardt,

The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219, 1245 (2015).

Coupled with the "hazy border" between excessive and acceptable force in determining whether a constitutional principle was clearly established, broad deference to officers as to the reasonableness of the force leaves plaintiffs with little recourse. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); Reinhardt, *supra*, at 1250 ("The failure to identify constitutional violations allows government officials and law enforcement officers to continue their unconstitutional practices secure in the knowledge that they cannot be called to account for their actions."). To the extent courts avoid the question of what constitutes excessive force, an officer may be granted qualified immunity even though the legality of the officer's conduct remains unsettled. In essence, courts that are unwilling to forge clear standards are signaling to officers that any use of force, including that which is deadly, may be constitutionally justifiable. Little to no attention is given to the reasonableness of a civilian's corresponding reactions because incorporating a civilian's perspective might limit the amount of force the officer can justifiably use to protect himself. The officer's conduct is subsequently rationalized whereas individuals are left to bear the physical, emotional, and monetary consequences of interacting with law enforcement.

II. The "haziness" between excessive and acceptable force empowers officers to operate with impunity, and increasingly violent encounters with officers decrease public confidence in the constitutional limits on state power.

The real world consequence of a laisser-faire jurisprudential doctrine, according to which reasonableness seems to be exclusively in the eye of the officer and qualified immunity justifies virtually every use of force, is that officers are more likely to test the limits of their power, act like a military force, and victimize poor and minority communities. *See* Gross, *supra*, at 162 ("[P]olice officers typically use force offensively rather than defensively and do so with at least some degree of premeditation."); Karen M. Blum, Scott v. Harris: *Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 54–55 (2007) ("Removing 'deadly force' from a special category of force that triggers certain preconditions will encourage police agencies to rewrite policies that currently treat deadly force as different, placing clear restraints on its use."); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1283 (1999).

A. Police officers are more likely to test the limits of their power, giving rise to public mistrust and resentment.

Walter Scott had a broken brake light when Officer Michael Slager pulled him over.[2] The conversation began fruitfully; Scott explained he lacked automobile insurance, but was working towards purchasing the car. Seemingly satisfied, Officer Slager returned to his vehicle. Subsequently, Scott momentarily attempted to decamp from his car, during which time Officer Slager instructed the frightened man to stay put. Scott panicked, exited his car, and took off running.[3] Officer Slager scrambled afterwards in hot pursuit, firing two Taser shots at a fleeing Scott.[4] The chase ensued around parks and pawn shops until Officer Slager ultimately arrived at the

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[2] Andrew Knapp, *Dash video strikes at heart of problem, critics of police say,* POST & COURIER, (Apr. 8, 2015), http://www.postandcourier.com/archives/dash-video-strikes-at-heart-of-problem-critics-of-police/article_2be4b237-cee6-5b08-8945-0b9baf4f0a01.html.

[3] Ashley Fantz & Holly Yan, *Dash cam video shows the moments before South Carolina police shooting,* CNN (Apr. 9, 2015), http://www.cnn.com/2015/04/09/us/south-carolina-police-shooting/.

[4] Mark Berman, Wesley Lowrey, & Kimberly Kindy, *South Carolina police officer charged with murder after shooting man during traffic stop,* WASH. POST. (Apr. 7, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/04/07/south-carolina-police-officer-will-be-charged-with-murder-after-shooting/?utm_term=.a3d72782328c.

fifty-year-old man.[5] Officer Slager again fired his Taser at Scott who responded by bolting. Scott had barely gone fifteen yards when Officer Slager cocked his handgun and fired eight shots. The bullets penetrated Scott's back thrice, lower back, and ear—just off the side of his head. Scott fell forward and died, his heart and lungs irreparably damaged.[6]

Scott's killing at the hands of the police made the news not so much because it was a rare event but because millions of Americans were able to watch on their televisions, computers, or phones the exact awful moment when an officer shot a fleeing man in the back. Some semblance of this tale plays out daily—perhaps with varying degrees of violence—but the effects, and often the fatal outcomes, are largely the same. No doubt the causes of police violence—particularly against people of color—are historically and culturally complex. Yet, it is difficult to escape the conclusion that part of the explanation lies in a laisser-faire police force jurisprudence that has inexorably placed increasing power in the hands of law enforcement by viewing virtually all use of force by the police as inherently reasonable. In effect, the

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[5] Jenny Jarvie, *Jury reports it's deadlocked in the fatal police shooting of Walter Scott in South Carolina*, L.A. TIMES (Dec. 2, 2016), http://www.latimes.com/nation/nationnow/la-na-walter-scott-trial-20161202-story.html.

[6] Chris Dixon & Tamar Lewin, *South Carolina Officer Faces Federal Charges in Fatal Shooting*, N.Y. TIMES (May 11, 2016), https://www.nytimes.com/2016/05/12/us/south-carolina-officer-faces-federal-charges-in-fatal-shooting.html?_r=0.

Court's precedent has let slip Fourth Amendment restraint from the police and the havoc that has ensued is no more and no less than the police testing the boundaries of their power. Walter Scott is not an isolated incident committed by a single rogue officer any more than Michael Brown, Eric Garner, Freddie Gray, Tamir Rice, Samuel DuBose, and so many others were isolated incidents committed by a handful of bad apples. Law enforcement's aggressive culture "facilitates and rewards violent conduct." Barbara A. Armacost, *Organizational Culture and Police Misconduct, 72* GEO. WASH. L. REV. 453, 455 (2004). As a result, society has grown aware—and expectant of—police brutality, and such violent conduct intended to dehumanize and degrade. *See* Bandes, *supra*, at 1276.

B. Increased militarization of the police force has directly contributed to officers' employment of excessive force and resultant police brutality.

Forty minutes past midnight, on May 15th, a Detroit Police Department SWAT team went to a local residence to serve a warrant on a shooting suspect. Wearing black Kevlar vests and armed with military-grade weapons, they appeared headed to war.[7] The plan was straightforward

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[7] *DPD officer involved in Aiyana Jones shooting identified*, WXYZ DET. (May 19, 2010), http://www.wxyz.com/news/region/detroit/detroit-police-officer-involved-in-shooting-death-of-aiyana-jones-reinstated.

enough: create a distraction inside the residence and apprehend the target suspect in the midst of the confusion. Not far behind was an A&E Network reality television show in tow for the military-grade performance.[8] As the operation began, officers outside rocketed a flashbang grenade through the residence's window, capable of inflicting searing damage to all in proximity. *Id.* As the flashbang grenade exploded inside the bedroom, another officer kicked in the front door. They rushed inside and, in the midst of the burning smoke, loud cries, and panic, an officer fired a shot, hitting a child in the head. When the smoke cleared from the hollowed-out and blackened shell of the apartment, the child was dead.[9] Her name was Aiyana Jones; she was seven-years-old. Although charges were pressed, the judge dismissed a manslaughter charge, while the jury deadlocked on other charges resulting in a mistrial. The prosecutor dropped remaining misdemeanor charges.

The SWAT raid that killed Aiyana Jones was routine. The suspect that officers sought to arrest was neither a drug kingpin nor a dangerous terrorist, but rather the run-of-the-mill suspect that police, in large urban areas and small rural

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[8] Elisha Anderson, *Detroit police sued over raid that killed girl, 7*, DET. FREE PRESS (Apr. 2, 2015), http://www.freep.com/story/news/local/michigan/detroit/2015/04/02/aiyana-stanley-jones-weekley/70829364/.

[9] Charlie LeDuff, *What Killed Aiyana-Stanley Jones?*, MOTHER JONES (Nov. 2010), http://www.motherjones.com/politics/2010/11/aiyana-stanley-jones-detroit.

towns, now pursue using the equipment, tactics, and mindset of soldiers at war.

Law enforcement has undergone a dramatic evolution from community peacekeepers to municipal armies, from guardians to warriors. *E.g.*, Gross, *supra*, at 162. Police militarization is in part a consequence of law enforcement feeling justified to employ excessive force without legal constraint. Logically, officers would equip themselves with whatever tools necessary to wield that awesome force. For when society is sent a signal that there is no amount of force left unjustified, police officers will rely on tools that are most deadly.

From the earliest days of officer training, police recruits are steeped in the "warrior mindset," likening officers to soldiers confronting life-threatening perils in the field; officers are instructed that survival is their primary task. *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 226 (2015). By extension, the officer is taught that the outside world is unforgiving, hostile, and out to get them. *Id.* at 227. Against this grim backdrop, "Officers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making." *Id.* at 228. In this sense, militarization is the physical embodiment and internal mindset of the excessive use of force doctrine.

Further fueling this drastic development, federal government programs have systematically armed local and state level law enforcement agencies. *See* ACLU, WAR COMES HOME: THE

EXCESSIVE MILITARIZATION OF AMERICAN POLICING 4 (2014). In furtherance of President Nixon's War on Drugs, the Reagan administration in 1981 secured passage of the Military Cooperation with Law Enforcement Act. This legislation allowed law enforcement at all levels to access lethal weapons, intelligence and military bases to combat drug-related activities. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 77 (2010) ("That legislation carved a huge exception to the Posse Comitatus Act, the Civil War-era law prohibiting the use of the military for civilian policing."). Subsequently, through the 1033 program—signed into law in 1989 and made permanent in 1996—Presidents George H. W. Bush and Clinton increased the military's transmission of weaponry and combat-style training to law enforcement agencies. *See* ACLU, *supra*, at 18; Alexander, *supra*, at 77. Quite literally, this weaponry came straight from the battlefield, including but not limited to: sniper rifles, military-style rifles, submachine guns, helicopters, and mine-resistant armored vehicles. *See* ACLU, *supra*, at 27. In total, the Department of Defense acting under the 1033 program, has transferred more than $4.3 billion military-grade tools and supplied tens of thousands to law enforcement agencies free of charge. ACLU, *supra*, at 26.

While previously reserved for trench warfare, it is now commonplace to see officers, and even the National Guard, armed to the teeth patrolling America's streets with a ready to strike mindset. RADLEY BALKO, RISE OF THE WARRIOR COP:

THE MILITARIZATION OF AMERICA'S POLICE FORCES 157 (2014); *See also* Mallory Meads, *The War Against Ourselves:* Heien v. North Carolina, *The War on Drugs, and Police Militarization,* 70 U. MIAMI L. REV. 615, 616 (2016). The introduction of SWAT forces to American streets was initially limited to the most dangerous of offenses—those involving hostages and urban trench warfare; today SWAT teams are routinely deployed on "no-knock" drug raids. Haberman, *supra.* More than 80,000 SWAT raids are executed annually in America today, spiking from 3,000 per year in the early 1980's.[10] What began as a misguided militarized effort to curtail drug production and use has permeated day-to-day policing. Meads, *supra,* at 616. Indeed, police have become conditioned to view the community members they serve as an adversary; society has responded in kind with a reciprocal viewpoint. *Id.* at 623.

C. Poor people and people of color are disproportionally victimized by excessive use of police force.

From 1980 to 2005, approximately 9,500 individuals were killed by law enforcement.[11] Other estimates peg killings by police at upwards of 1,000 lives lost annually. Nancy C. Marcus, *From*

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[10] Radley Balko, *Shedding light on the use of SWAT teams,* WASH. POST. (Feb. 17, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/02/17/shedding-light-on-the-use-of-swat-teams/?utm_term=.0dde1e5878b0.

[11] Jeff Kelly Lowenstein, *Killed by the Cops,* COLOR LINES (Nov. 4, 2007), http://www.colorlines.com/articles/killed-cops.

Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 61 (2016). In 2016 alone, 963 civilians were shot by law enforcement,[12] nearly mirroring the 965 lives cut short in 2015. Gross, *supra*, at 178. When law enforcement officers and a suspect have an encounter that results in a death between one of the two parties, the suspect is slain approximately ninety-seven percent of the time.[13]

These alarming statistics are only further compounded by the racial dimension of the killings, as "unarmed victims of police killings tend to disproportionately be people of color." Marcus, *supra*, at 68. An unarmed black man is more than seven times as likely than a white man to be gunned down by a police officer.[14] This travesty occurs despite the fact that, when compared to white Americans, black Americans are more than two times as likely to be unarmed when fatally shot by police. Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY

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[12] WASHINGTON POST FATAL FORCE DATABASE, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Feb. 9, 2017).

[13] Gross, *supra*, at 167; Kimberly Kindy, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST. (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/.

[14] Sandya Somashekhar, et al., *Black and Unarmed*, WASH. POST. (Aug. 8, 2015), http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/.

& PUB. POL'Y 1 (forthcoming Feb. 2017). Throughout 2015, police ended an unarmed black man's life every nine days.[15] During that same time, a total of 1,134 young black men were killed by law enforcement officers.[16] Indeed, black individuals are significantly overrepresented as victims compared to their overall portion of the population. *See e.g.*, Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 232 (2016). Even though young African American men aged fifteen to thirty-four comprise two percent of the United States, they were more than fifteen percent of the total number of deaths in 2015 at the hands of police. Swaine et al., *supra*. Indeed, nearly one in sixty-five young African American men will be killed by the police for no justifiable reason whatsoever. *Id.* By contrast, only forty-two police officers were shot and killed in 2015, a year which scholars have pointed out has been the safest for police in American history.[17]

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[15] DeNeen L. Brown, *How videos of police shooting unarmed black men changes those who watch them*, WASH. POST. (May 8, 2016), https://www.washingtonpost.com/local/how-videos-of-police-shooting-unarmed-black-men-changes-those-who-watch-them/2016/05/07/da2cceee-d4ed-11e5-9823-02b905009f99_story.html?utm_term=.724f1c6007d5.

[16] Jon Swaine et al., *The Counted: Young black men killed by US police at highest rate in year of 1,134 deaths*, THE GUARDIAN (Dec. 31, 2015), https://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men.

[17] Bill Chappell, *Number of Police Officers Killed by Gunfire Fell 14 Percent in 2015, Study Says*, NPR (Dec. 29, 2015),

While, these alarming statistics have been captured by major news outlets, researchers, and civic organizations, there does not exist a wholly accurate measure of police use of excessive force in the United States.[18] The Federal Bureau of Investigations does operate a national database of lethal law enforcement shootings, but police departments are not required to regularly update the statistics.[19] Law enforcement reported only 2,931 officer killings of civilians between 2003–2009, which the Bureau of Justice Statistics determined included only thirty-six to forty-nine percent of the total homicides. Gross, *supra*, at 177. Re-calculating these reports of excessive force would then mean between 5,979 or 8,118 individuals were victims of law enforcement. *Id.* In response to these glaring deficiencies in accuracy and reporting, within the last several months the Federal Bureau of Investigation has begun developing a database on the use of force nationwide to establish baseline numbers on the

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http://www.npr.org/sections/thetwo-way/2015/12/29/461402091/number-of-police-officers-killed-by-gunfire-fell-14-percent-in-2015-study-says; Gross, *supra*, at 169.

[18] *See generally* Naomi Shavin, *Our Government Has No Idea How Often Police Get Violent With Civilians*, NEW REPUBLIC (Aug. 25, 2014), https://newrepublic.com/article/119192/police-use-force-stats-us-are-incomplete-and-unreliable; Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013).

[19] Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST. (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/.

trendlines.[20] Yet, reporting by law enforcement will still remain voluntary.[21]

How have we gotten to the point where civilian, and in particular minority, loss of life at the hands of the police has become so routine? The literature increasingly points to the role of repeat interactions African Americans have with law enforcement officers. Critically, these recurrent interactions heighten the chance of police violence. Sekhon, *supra*, at 205. Studies have demonstrated thoroughly the corrosive associational link society and thus officers make between black men and violent criminality. *See* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 172 (2016). Other experiments have demonstrated that witnessing or even hearing about black criminality boosts an individual's support for punitive policing. *See* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1950–52 (2014). Consequently, if an officer holds these toxic associational links, then a black man's increased interactions with the police only serve to increase the chances the officer

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[20] Press Release, Department of Justice, Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data. (Oct. 13, 2016), https://www.justice.gov/opa/pr/justice-department-outlines-plan-enable-nationwide-collection-use-force-data.

[21] Tom McCarthy et al., *FBI to launch new system to count people killed by police officers*, THE GUARDIAN (Dec. 8, 2015), https://www.theguardian.com/us-news/2015/dec/09/fbi-launch-new-system-count-people-killed-police-officers-the-counted.

acts on the racially-charged stereotypes, thereby leading to violence. Carbado & Rock, *supra*, at 167. This striking revelation could explain why black and Hispanic individuals are 50% likelier to experience use of force during a police encounter. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 5 (NBER, Working Paper No. 22399, 2016). Even in circumstances when no arrest was made, black individuals are significantly more likely to experience excessive force. *Id.* at 37.

These troubling associations are further borne out by the consistent number of Justice Department administered pattern or practice federal investigations of police departments.[22] Between 1994 and 2015 the Justice Department initiated sixty-seven police department investigations, consistently finding officers having employed excessive use of force.[23] Additionally, from 2000 to 2013, nearly 325 preliminary inquiries arose. Stroud & Rojanasakul, *supra*. Of the twenty-five police departments screened out for independent monitoring and reformation, sixteen

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[22] Matt Stroud & Mira Rojanasakul, *A 'Pattern or Practice' of Violence in America*, BLOOMBERG (May 27, 2015), https://www.bloomberg.com/graphics/2015-doj-and-police-violence/.

[23] Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, WASH. POST. (Nov. 13, 2015), http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/; Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 816 (2016).

departments contained officers who regularly utilized excessive force. Kelly et al., *supra*. For instance, the Detroit Police Department contained officers who, in a five-year period, lethally shot forty-seven individuals. *Id.* In a seventeen-month window, the New Orleans Police Department fatally shot twenty-seven people—every victim was black. *Id.* In Ferguson, Missouri, virtually ninety percent of the police department's incidents involving excessive force were waged against African Americans. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5 (2015).

Society at large has grown increasingly aware of civilian deaths at the hands of police officers through a steady stream of visuals. Yet, police brutality is not a new phenomenon, quite the opposite. *Id.* at 54.

The telecommunication revolution of the Internet, cable news, and social media now shine the spotlight into the unending torrent of police violence pervading minority, impoverished communities. These acts were not new, nor unprecedented in number; the acts are simply being brought to the public conscience for many for the first time. *Id.* at 53. The victims' names have become immortalized, engrained as a wretched tear on our already deeply scarred national tale.

For example, twenty years ago Philando Castile would have died in obscurity. Castile had just finished grocery shopping with his girlfriend Diamond Reynolds and her toddler in the suburbs of St. Paul when he was pulled over by police—an

exceedingly common traffic stop for Castile.[24] Before he died, he had been pulled over at least fifty-two times.[25] On this occasion, Officer Jeronimo Yanez falsely believed that Castile was the suspect in a robbery. Officer Yanez called his colleague Joseph Kauser for backup; the duo tracked down the car, approaching the vehicle from both sides.[26] Officer Yanez followed the typical law enforcement formalities, requesting Castile's license and registration.[27] Castile explained that—as a licensed carrier—he had a pistol on his person.[28] Castile then reached for his papers. Instantly, officer Yanez shouted, "Don't move!" simultaneously

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[24] *Philando Castile death: Aftermath of police shooting streamed live,* BBC (July 7, 2016), http://www.bbc.com/news/world-us-canada-36732908.

[25] Carla K. Johnson & Steve Karnowski, *Stopped 52 times by police: Was it racial profiling?,* ASSOC. PRESS (July 9, 2016), http://bigstory.ap.org/article/81351f97c0be4caea5c91b5662848129.

[26] Mark Berman, *Minnesota officer charged with manslaughter for shooting Philando Castile during incident streamed on Facebook,* WASH. POST. (Nov. 16, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/?utm_term=.635ac215bcbf.

[27] Mitch Smith et al., *Peaceful Protests Follow Minnesota Governor's Call for Calm,* N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/philando-castile-jeronimo-yanez.html.

[28] Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile is Charged with Manslaughter,* N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html.

reached for his firearm and repeatedly shot Castile. *Philando Castile death, supra.* Castile's girlfriend, a passenger in the car, pulled out her phone and, as blood spilled out of Castile's arm and sides, live-streamed to the entire world his last dying moments.[29]

In the catalogue of civilians killed by police in recent years, Castile's death may not have been as brutal as Walter Scott's being shot in the back, or as startling as Tamir Rice, a twelve-year-old boy shot seconds after police officers arrive on the scene as he played with a toy gun. What makes Castile's killing both unique and a revelation to the larger public is the awful—not to say obscene—spectacle of watching a man die live on the Internet. For an increasing number of Americans, Castile's death accomplished what countless statistics failed to do failed to do: make real the fact of police brutality.[30] What the African American community has collectively known for generations, through lived experience, can now be digitally documented for all Americans. Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 How. L. J. 5, 13 (2015).

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[29] Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings 'an American Issue,'* N.Y. Times (July 7, 2016), https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html.

[30] *See* Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times (Oct. 4, 2016), https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html.

D. Excessive levels of force against members of the community negatively impacts individuals' perception of law enforcement.

The violence police visits upon communities of color creates fear, mistrust, and resentment of police officers among the very people who have the most pressing need of law enforcement services, and upon whom police most urgently rely in order to be effective. Yet, the laisser-faire use of force doctrine does nothing to build trust or promote cooperation. Rather, the doctrine has led to a vicious cycle, in which the greater the level of police brutality the greater the level of mistrust, leading to more brutality, leading to greater mistrust ad infinitum. *See* Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J.L. & PUB. POL'Y 100, 112 (1998).

With approximately 18,000 police units and over 765,000 officers, the United States relies on a punitive model of justice. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1844 (2015). Yet, for all of its power, the entire punitive legal apparatus operates on a plane of trust: trust in the judiciary to interpret the laws and trust in police to enforce the laws. Absent that trust, the perceived and actual legitimacy of the system breaks down. Indeed, the very first pillar of the Obama administration's landmark White House Task Force on 21st Century Policing report called for re-building trust to spur police reform.

Officers frequently note, and courts themselves frequently cite, fear for officers' lives as justification for excessive or deadly use of force, arguing in effect that they fear and do not trust the people they serve. But what remains little discussed is that this police brutality serves to pit police against the community. More specifically, through the augmented use of excessive force encouraged by judicial patronage, police forces have, quite literally, shaken the trust out of their constituent communities. "[H]ow and what we police reinforces walls of 'us' versus 'them,' insularity, provincialism, and an 'ecology of fear.'" I. Bennett Capers, *Policing, Race, and Place,* 44 HARV. C.R.-C.L. L. REV. 43, 71 (2009).

Rather than communities in need, law enforcement increasingly view neighborhoods as war zones. *See, e.g.*, Carbado & Rock, *supra*, at 181. War torn imagery especially that repeated ad nauseam in the popular press and lived experience—think no further than the moniker "Chiraq" to describe Chicago—plays a powerful role in uprooting planted seeds of trust. A relationship built on trust between a tight-knit community and their local neighborhood officer, a neighbor even, is fundamentally altered when an imposing man in paramilitary regalia clutching oversized arms is on the scene. Haberman, *supra*. That man is not one of "us," he is a soldier patrolling occupied territory. The trust of innocent bystanders is not an immediate concern, if at all, when an officer looks out from his perch and sees only enemies. Meads, *supra*, at 618; Balko, *supra*, at 241. The White House Task Force on 21st Century Policing report

explicitly references this concern and encourages police to "proactively work cooperatively and collaboratively with the communities they serve, rather than acting as an occupying force in urban communities." Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform,* 12 DUKE J. CONST. L. & PUB. POL'Y 53, 90 (2016); WHITE HOUSE TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 41–42 (2015).

Even after police violence has ended, the breakdown in community and law enforcement trust prevails. *See* Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force,* 64 N.Y.U. ANN. SURVEY. AM. L. 391, 395 (2008). This reality cuts both ways as police distrust their own guarded communities and rely on venomous racial stereotypes. *Id.* Consequently, the whole of the justice system is shaken as citizen assistance in reporting crime and cooperating with police officers declines. *Id.* The toll that excessive and deadly force exact thus far exceeds unconscionable loss of life.

Fear of law enforcement is prevalent amongst marginalized communities along race and class lines. This breakdown in trust is particularly pronounced in minority communities. *See e.g.*, Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences,* 32 LAW & SOC'Y REV. 777, 777–78

(1998). Police, elected officials, and the general public are simply afraid of black men in general, poisoning an otherwise hospitable climate for warmer relations. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (forthcoming 2017). Or that poor and minority communities bear the brunt of police attention, from a national police force that is disproportionately white. *See, e.g.*, Friedman & Maria Ponomarenko, *supra*, at 1864; Capers, *supra*, at 56.

When a black man is more likely to be cast as a violent criminal in the minds of law enforcement, the "less space that person has to assert rights, and the more work he has to do to signal compliance." Carbado & Rock, *supra*, at 180. Consequently, the officer is incentivized to pursue excessive force while the black man is triggered to activate an internal feedback loop of social marginalization and distrust of law enforcement. *Id.* Until the ills of permissive acceptance of the widespread use of excessive force are uprooted no resolution to this brutish nightmare is in sight.

III. Vindicating society's interests in limiting the use of excessive force requires approaching the Fourth Amendment analysis from the standpoint of a reasonable community member.

In theory, this Court has long articulated that whether force is excessive should be determined by an objective reasonableness standard in light of all the facts and circumstances. *See, e.g.*, *Brosseau*, 543 U.S. at 198. In practice,

however, when an officer injures or kills a civilian the victim's point of view is rarely a part of the circumstances informing reasonableness analysis. Rather, when a civilian is harmed or killed, the question of whether an officer acted reasonably is more often than not limited to understanding what the officer saw, heard, thought, felt or imagined at the moment he or she applied a chokehold, fired a tear canister, or discharged a weapon. Case after case, courts consider the factual circumstances which precipitated the use of deadly force—almost exclusively through a framing of the officer—against a static conception of societal interests. *Garner*, 471 U.S. at 8. This failure to give serious consideration to individuals' legitimate expectations to be free from state-sponsored violence undermines the balance of "competing interests" this Court recognized as "the key principle of the Fourth Amendment." *Id.* at 8.

Faced with new evidence on the use of excessive force by law enforcement, the Court should reaffirm that the excessive force inquiry is fact-bound and includes relevant events that may precede the precise moment force is used. Recognizing that a retrospective judgment on an officer's intent and motivations is not relevant to the objective reasonableness of a decision to use force should not negate other factors in the inquiry such as how, when, and where the seizure occurred or the danger to the public at large. *See, e.g.*, *Pauly*, 137 S. Ct. 552 (noting that an alternate ground for finding that an officer unreasonably shot a suspect might include whether the later-arriving officer knew that the first officers on the scene failed to

announce themselves as police); *Sheehan*, 135 S. Ct. at 1775–76 (considering the call for emergency assistance, knowledge of the patient's threat to kill three people, and the patient's possession of a weapon in judging the reasonableness of the officer's actions); *Plumhoff*, 134 S. Ct. at 2021–22 (considering the speed at which the suspect was driving, the presence of other civilians, the five hour length of the high speed car chase, and the suspect's persistence on fleeing in judging the reasonableness of an officer's decision to shoot into the suspect's vehicle).

Furthermore, reasonableness of an officer's conduct should comport with evolving societal interests such as limiting police violence against citizens. If we accept a dual-sided examination of the totality of the circumstances inquiry, which considers society's legitimate expectations on the propriety of the use of force, then we reconcile the government's interest in effective law enforcement with society's desire to be free from police intrusion. This shift in how to evaluate the reasonableness of an officer's use of force would require courts to imagine incidents from the perspective of reasonable civilians in addition to reasonable officers. *Commonwealth v. Warren* provides an instructive model of how a civilian's perspective may coalesce with existing Fourth Amendment standards and elucidate incidents where officers unreasonably exceeded the scope of their authority. 58 N.E.3d 333, 342 (Mass. 2016). In *Warren*, a unanimous Massachusetts Supreme Court determined that little weight should be given to flight in assessing whether officers had the

requisite reasonable suspicion to apprehend a defendant who ran away rather than confront the officers.[31] The court noted that a defendant "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." 58 N.E.3d at 342.

With respect to the excessive force doctrine, courts should similarly assess how a reasonable civilian might respond in an incident with police officers, especially in communities where officers are associated with danger rather than security. The Ninth Circuit's decision provides an opportunity to imagine a police encounter through the eyes of a civilian in a place where Fourth Amendment protections are thought to be the strongest. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("The prohibition [of firearms] extends, moreover, to the home, where the need for defense of self, family, and property is most acute."); Br. in Opp'n. at 18. In this scenario law enforcement's presence was unexpected, unannounced, and unwarranted. In Mendez's home, there was no threat to the public as there

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[31] *Id.*; Ariane de Vogue, *Massachusetts Court: Black Man Fleeing Police Does Not Signify Guilt*, CNN (Sept. 22, 2016, 9:07 PM), http://www.cnn.com/2016/09/22/politics/massachusetts-court-ruling-fleeing-police/.

might have been in *Mullenix*, *Scott*, or *Plumhoff*. However, the officer's forced entrance into the home of an unsuspecting civilian in the middle of the night places the officer in the role of a common trespasser, from which an individual is entitled to protection. *Cf. Heller*, 554 U.S. at 628. In that context, we must then ask whether it is reasonable for an *intruder* to use force against a victim of trespass.

Moreover, a sizeable portion of this Court's jurisprudence on the extent to which officers can lawfully use deadly force has developed in the context of exigent circumstances. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1775 (holding that officers used reasonable force when responding to a mentally ill patient who advanced upon officers with a knife because the officers were entitled to protect themselves); *Mullenix*, 136 S. Ct. at 312 (holding that an officer who fired six shots into a speeding vehicle, which resulted in the death of a driver fleeing arrest, was entitled to qualified immunity because there was no clearly established law on whether such force was unreasonable). Under such dangerous and escalating circumstances, officers may be required to make "split-second decisions" in pursuing suspects. The practical, if not legal, effect of the Court's desire to give officers "breathing room" has resulted in justifying the use of force even in instances where officers contribute to the exigency.[32] However, encounters with officers are

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[32] *See Sheehan*, 135 S. Ct. at 1774 (stating that the qualified immunity analysis is meant to give officers "breathing room" to make reasonable but mistaken judgments); Kara Dansky,

as tense, as uncertain, and as rapidly evolving for civilians yet civilians are not afforded the same breathing room for mistakes like misplacing their car keys or driving with a cracked windshield.[33] The very presence of officers is often considered a threat to civilians. *Supra*, Part II.D.2. Although much of Fourth Amendment law is often developed in the context of unsympathetic felons, the breadth of the excessive force doctrine fails to account for such rudimentary encounters between law enforcement and the communities they serve.

Subsequently narrowing when and how officer's use deadly force may be circumscribed along time and spatial limits. Society might accept the times where officers rush into public quarters with guns ablaze in active pursuit of a dangerous criminal and still oppose officers barging into the home of sleeping civilians without a warrant or warning hours after they have lost sight of the suspect. Alternatively, society might condone an

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How Many People Must Be Maimed or Killed Before We End the Militarization of Our Police Forces?, ACLU (Oct. 7, 2014, 5:00 PM), https://www.aclu.org/blog/speakeasy/how-many-people-must-be-maimed-or-killed-we-end-militarization-our-police-forces (describing a grand jury's decision not to indict officers in a warrantless drug raid who severely injured a nineteen-month-old child by throwing a flashbang grenade into the wrong house).

[33] *See Colorado Springs Police Drew Weapons, Used Excessive Force Against African American Man Who Misplaced His Car Keys*, ACLU (July 14, 2005), https://www.aclu.org/news/colorado-springs-police-drew-weapons-used-excessive-force-against-african-american-man-who.

elevated use of force against suspects fleeing in a high speed chase, yet simultaneously condemn the same use of force against an unarmed suspect running with their back turned to the officer, in which there is less of a danger to public and officer safety. In the first instance, conflict with law enforcement is readily foreseeable. Civilians can therefore rationalize law enforcement's interest in public safety and a corresponding use of force in the face of the imminent threat. In either case, the reasonableness of an officer's conduct would be measured against society's expectations on how far officers may intrude upon their person or home.

The present state of police and community relationships necessitates the aforementioned review of society's Fourth Amendment interests, specifically society's interest in limiting the use of state police power against its citizens. The lack of clear standards on when and how officers are allowed to use deadly force practically places individual officers in the role of "judge, jury, and executioner." Gross, *supra*, at 158. We allow officers to make reasonable mistakes in judgment with potentially deadly consequences for citizens. *See Sheehan*, 135 S. Ct. at 1777 (stating that a Fourth Amendment violation cannot be based on bad tactics that could have been avoided). Such largely deferential inquiries into the reasonableness of an officer's use of force do not adequately account for the nature and quality of intrusion on the individual's Fourth Amendment interest in life. *See supra*, Part I. Where officers are permitted to make human error but civilians may not survive a traffic stop, the latter is stripped of their humanity. *See*

Gross, *supra*, at 180 (arguing that "[u]sing deadly force against someone who *might* have a weapon is only reasonable if we value the safety of the officer more than that of the suspect"). In considering whether to foreclose the opportunities for plaintiffs to bring distinct claims for damages incurred as a result of a Fourth Amendment violation, as opposed to damages stemming from excessive force claims, we need to decide whether the "breathing room" officers need to perform their duties is more important than an individual's right to be secure in property and life. Particularly, where police encounters are more likely to result in the death of a civilian rather than a responding officer "we need to decide if the life of a police officer is more valuable" than that of any other citizen. *See* Gross, *supra*, at 180.

CONCLUSION

The question of whether the police wield violence disproportionately against poor people and people of color is now part of the national conversation. What we have respectfully attempted to point out in this brief is that the fact of police brutality against black and brown people is not new; the only thing new is that it is now transmitted on the Internet for all the world to see. What we have, equally respectfully, also tried to point out in this brief is that the frequency and seeming impunity with which police wield violence cannot be separated from this Court's Fourth Amendment doctrine, according to which the reasonableness of excessive force is analyzed purely from the point of view of the officer, and the

qualified immunity defense excuses all manner of excessive force because supposedly every police interaction is a unique, in-the-moment event that has never been litigated or resolved. If "[t]he truth is the police reflect America, in all of its will and fear,"[34] so too police brutality and violence reflect this Court's jurisprudence, in all of its laissez-faire deference to police officers.

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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February 23, 2017

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[34] TA-NEHISI COATES, BETWEEN THE WORLD AND ME 24 (2015).

AND
BRIEFS

No. 16-369

Supreme Court, U.S.
FILED
JAN 23 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

ANGEL MENDEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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The Los Angeles County Police Chiefs' Association respectfully submits this brief *amicus curiae*, pursuant to Supreme Court Rule 37 and the written consent of all parties.[1]

INTERESTS OF THE *AMICI CURIAE*

The Los Angeles County Police Chiefs' Association ("LACPCA") is a nonprofit mutual benefit corporation consisting of the Police Chief Executives of the 45 independent cities in Los Angeles County. LACPCA focuses on advancing the science and art of police administration and crime prevention in Los Angeles County; coordinating the implementation of law enforcement efforts by local law enforcement leaders; and developing, teaching, and disseminating professional law enforcement practices.

One of LACPCA's missions is to ensure that all 45 independent cities in Los Angeles County provide their peace officers with ongoing training that is thorough, effective, and consistent with the law and best practices. Thus, the members of LACPCA monitor and evaluate case law and legislation through the lens of how they will train officers on new legal developments. LACPCA has a strong interest in this case because the

[1] Petitioners and Respondents have consented to the filing of this brief *amicus curiae*. Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Ninth Circuit has created a rule of liability for which it is exceedingly and unnecessarily difficult to provide clear and effective training.

SUMMARY OF THE ARGUMENT

The provocation rule allows a police officer to be held personally liable for damages for a reasonable and lawful use of force if the officer "provoked" the confrontation by violating the Fourth Amendment, even if the violation was relatively minor or technical.

The rule is confusing, and it is extremely difficult for law enforcement agencies to effectively incorporate into their training. The current best practice for training officers about the use of force is "scenario-based" training, which allows officers to practice and develop their responses in simulated dangerous situations. While scenario-based training encourages officers to remain mentally present, adapt to changing circumstances, and think creatively, the so-called provocation rule encourages officers to look backwards, and focus on their tactical decisions leading up to a confrontation. Instead of encouraging better policing, the provocation rule will encourage less policing, or at best, distracted policing. It is impossible to effectively train officers what to do when confronted with circumstances in which using force would be deemed legal yet still a basis for liability.

The provocation rule is unnecessary. The Fourth Amendment, aided by this Court's long line of cases interpreting its application to police conduct including *Graham v. Conner*, 490 U.S. 386 (1989), already effectively protects citizens against warrantless searches and excessive force, and public safety agencies are already training their officers on the consequences of violating the Fourth Amendment.

ARGUMENT

I. THE PROVOCATION RULE IS COUNTERPRODUCTIVE TO CURRENT TRAINING EFFORTS AND WILL NOT HAVE THE DESIRED RESULTS.

In *Mendez v. County of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016), the district court determined that Deputies Christopher Conley and Jennifer Pederson violated the Fourth Amendment by opening the door to a wooden shack inhabited by Angel Mendez and Jennifer Garcia ("Respondents") without a warrant and without first knocking and announcing their presence. *Id.* at 1185-86. The deputies then fired their guns at Respondents, which was not excessive force in light of Deputy Conley's reasonable but mistaken fear upon seeing Mr. Mendez's BB gun. *Id.* Yet, the deputies were held individually liable for $4 million for doing so. *Id.* at 1186. On appeal, the Ninth Circuit Court of Appeals described the provocation rule as follows: "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent

Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1193 (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

In recent years, law enforcement agencies, task forces, and various organizations throughout the country have been analyzing how best to deliver policing services in a way that reduces the number of police-involved shootings and use of force incidents and increases public trust. See, e.g., *Guiding Principles on Use of Force*, Police Executive Research Forum (March 2016), http://www.policeforum.org/assets/guidingprinciples1.pdf; *Final Report of the President's Task Force on 21st Century Policing*, United States Department of Justice's Office of Community Oriented Policing Services (May 2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf; *CBP Use of Force Training and Actions to Address Use of Force Incidents (Redacted)*, Department of Homeland Security's Office of Inspector General (September 2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf. "The expectation is for police officers to resolve situations safely and with the least amount of force possible." *Los Angeles Police Department 2015 Use of Force Year-End Review Executive Summary*, Los Angeles Police Department, 17 (2015), http://assets.lapdonline.org/assets/pdf/UOF%20Executive%20Summary.pdf.

The emerging answer to this is "scenario-based" training. See, e.g., *CBP Use of Force Training and Actions to Address Use of Force Incidents*, *supra*, at 11

("CBP should continue to expand the use of scenario-based training and evaluate new technologies to support agents and officers."); *Final Report of the President's Task Force on 21st Century Policing*, *supra*, at 60 ("The Federal Government should support research into the development of technology that enhances scenario-based training . . . and enables the dissemination of interactive distance learning for law enforcement."). Scenario-based training, also called reality-based training, is a type of simulation training that allows officers to learn experientially, but in a safe environment. See *Guiding Principles on Use of Force*, *supra*, at 64. For instance, the Los Angeles Police Department has begun using "Force Option Simulators" to create virtual reality scenarios in which officers can practice responding to challenging and dangerous situations that could require a use of force. *LAPD 2015 Use of Force Year-End Review Executive Summary*, *supra*, at 20. According to the Police Executive Research Forum ("PERF"),

> [a]gencies should provide use-of-force training that utilizes realistic and challenging scenarios that officers are likely to encounter in the field. Scenarios should be based on real-life situations and utilize encounters that officers in the agency have recently faced. Scenarios should go beyond the traditional "shoot-don't shoot" decision-making, and instead provide for a variety of possible outcomes, including some in which communication, de-escalation, and use of less-lethal options are most appropriate. Scenario-based training

> focused on decision-making should be integrated with officers' regular requalification on their firearms and less-lethal equipment.

Guiding Principles on Use of Force, *supra*, at 64.

In 2014, the East Bay Times reported that since 2008, when the City of Richmond began requiring its officers to train four times per year with role-playing scenarios on responding to armed residents, "the Police Department has averaged fewer than one officer-involved shooting per year," none of which have been fatal. Robert Rogers, *Use of Deadly Force by Police Disappears on Richmond Streets*, East Bay Times (Sept. 6, 2014, 6:04 PM), http://www.eastbaytimes.com/2014/09/06/use-of-deadly-force-by-police-disappears-on-richmond-streets/.

Scenario-based training requires officers to remain mentally present, constantly assessing the current threat level and how to respond. For instance, under the Critical Decision-Making model proposed by PERF, officers should be asking themselves the following questions:

- Do I need to take immediate action?
- What is the threat/risk, if any?
- What more information do I need?
- What could go wrong, and how serious would the harm be?
- Am I trained and equipped to handle this situation by myself?

- Does this situation require a supervisory response to provide additional planning and coordination?
- Do I need additional police resources (e.g., other less-lethal weaponry, specialized equipment, other units, officers specially trained in mental health issues)?
- Is this a situation for the police to handle alone, or should other agencies/resources be involved?

Guiding Principles on Use of Force, *supra*, at 82. Under the "Suspect Threat Assessment and Response Training" ("START") model, officers are trained to "constantly assess their tactics and to measure the constitutionality of their force decisions in light of information that becomes available as the situation develops." John Klein and Ken Wallentine, *A Rational Foundation for Use of Force Policy, Training and Assessment*, AELE Law Enforcement Legal Center, 5 (2013), http://www.aele.org/START.pdf. Officers are also encouraged to be creative and flexible in their efforts to de-escalate potentially dangerous situations. *Id.* at 9.

In other words, in order for a police officer to use her scenario-based training skills successfully in the field, she must avoid distractions and stay in the moment. However, the provocation rule does not encourage officers to stay in the moment. Rather, it encourages officers who are faced with life or death decisions to think back on every tactical decision *leading up to* that moment, because even if an officer assesses her current situation correctly and determines

that firing her gun is reasonable, legal, and necessary, she knows that if she shoots, she could still be liable for millions of dollars for a previous tactical error. Instead of an officer focusing her attention on the suspect, the situation, and the best possible solution, that officer will be distracted and second-guessing past decisions.

The provocation rule also discourages proactive law enforcement, and encourages officers to try to minimize liability by avoiding dangerous situations in the first place. Large damage awards against individuals can lead to "overdeterrence," and

> [t]he risk of overdeterrence is especially serious in the police context, even if damages are not set too high. Police officers ordinarily get no tangible benefit from the marginal "good" decision. Thus, if they are made to pay for bad ones, they can simply choose to minimize searches and arrests, or at least to avoid them in all but clear cases. This is a real problem, both because police have a great deal of discretionary authority, and because they often exercise that authority (and gather their information) on the street, where it is very hard to monitor them. All of which makes it easy for officers, all too often, to "drive on by" – to choose not to search or arrest at all. This means that overdeterrence probably exists even if damages are assessed accurately; a bias toward overvaluation will only aggravate the problem.

William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 903-04 (1991). Thus, instead of encouraging better policing, the provocation rule will encourage less policing, or distracted policing.

II. THE PROVOCATION RULE IS A CONFUSING AND UNNECESSARY DOCTRINE THAT HINDERS PUBLIC SAFETY AGENCIES' ABILITY TO EFFECTIVELY TRAIN PEACE OFFICERS.

When a new law takes effect, it is the duty of public safety agencies to translate that law into guidance for their peace officers. If an officer does not leave a training session with a clear understanding of what she is supposed to do or not do with respect to a new law or new interpretations of an existing law, the training is useless to the officer, the agency, and the public.

If this Court upholds this rule, law enforcement agencies will attempt to distill it into clear instructions for their officers, but there is no clear message about what officers can (or must) do differently in the future to better protect the public and themselves. How does a law enforcement agency teach this rule to its officers in clear and helpful terms? It cannot. The provocation rule is needlessly confusing. Should the deputies in *Mendez* not have used force despite the fact that it was lawful under the Fourth Amendment?

As this Court has previously stated, it is important that officers be able to "reasonably [] anticipate when their conduct may give rise to liability for damages."

Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Similarly, effective law enforcement training informs officers of the potential risks and consequences of their mistakes. While the methods of use of force training continue to evolve (discussed above in section I), the law is clear that an officer may be held personally liable for using excessive force. See, e.g., *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 73 (1st Cir. 2016). This is an easily-explained concept: if an officer uses unreasonable force, and in doing so, causes someone harm, the officer may be liable to that person for damages.

The provocation rule throws the relative clarity of this concept into concerning uncertainty. This case, and the provocation doctrine in general, charges agencies with the perplexing task of trying to explain to their officers that if a situation calls for force against a civilian, and officers use the appropriate level of force, the officers may still be liable to that person for damages if the officers made a mistake leading up to their use of force, and they cannot expect the amount of damages to be proportional to the scope of their mistake.

Further, from a training perspective, the rule is not only confusing, but also unnecessary. There is already a rule in place to protect citizens against warrantless searches and excessive force – the Fourth Amendment – and there are already consequences in place for violating the Fourth Amendment. See, e.g., *Hector v. Watt*, 235 F.3d 154, 159 (3d. Cir. 2000) (" . . . the point of the exclusionary rule is to deter violations

of the Fourth Amendment. . . ."); see also, *Miranda-Rivera*, 813 F.3d at 73 (discussing personal liability for excessive uses of force).

Public safety agencies already train their officers on the importance of obtaining warrants, knocking and announcing their presence before conducting a search, and using an appropriate level of force to respond to a situation. They already train their officers on the consequences of failing to obtain a warrant, failing to knock and announce your presence, and using excessive force. But the provocation rule as articulated in the court below – which allows individuals to be held personally liable for the unforeseen consequences of tactical decisions – will not prevent the type of harm that occurred in this case. What additional training could the deputies have received that would have prevented Respondents' injuries? Should an agency tell an officer that, if faced with life-threatening circumstances, he should either (1) not use reasonable force, or (2) stop and consider if it is possible that he technically violated the Fourth Amendment in the last hour? Or the last two hours? From the perspective of law enforcement agencies, the doctrine is simply not workable, particularly in high stress, and potentially life-changing moments, where police officers have to focus on the situation as it is unfolding.

CONCLUSION

For the foregoing reasons, LACPCA respectfully requests that this Court overturn the lower court's decision, disapprove the provocation rule, and instead direct that cases be analyzed according to this Court's established case law interpreting the Fourth Amendment.

Respectfully submitted,

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RECORD AND BRIEFS

FILED
JAN 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON, PETITIONERS,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MAJOR COUNTY SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether the Ninth Circuit's "Provocation Rule" should be barred as it conflicts with *Graham* v. *Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other Courts of Appeals?

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BRIEF OF *AMICUS CURIAE* MAJOR COUNTY SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

Amicus curiae, Major County Sheriffs' Association respectfully submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Major County Sheriffs' Association, a 26 U.S.C. § 501(c)(4) non-profit, is an association of elected sheriffs representing the nation's largest counties with populations of 500,000 people or more, serving over 100 million Americans. The Major County Sheriffs' Association works to promote a greater understanding of law-enforcement strategies to address future problems and identify law-enforcement challenges facing the members of its organization.

SUMMARY OF ARGUMENT

Under *Graham* v. *Connor*, 490 U.S. 386, 396 (1989), law enforcement agents who use force—including lethal force—to subdue a free person are engaged in a "seizure," and the reasonableness of that seizure under the Fourth Amendment is determined by "a careful balancing" of the government's

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent are on file with the Clerk's Office.

interest against the individual right at stake. *Id.* The government *always* has a profound and legitimate interest in subduing those who threaten the lives of law enforcement agents or others. That interest in the seizure does not diminish merely because the search is without a warrant, nor is a person's individual right to be free from unreasonable seizures of their person greater when agents lack a search warrant. Consequently, an agent's use of lethal force to stop a violent attack should still be considered a reasonable seizure under the Fourth Amendment, whether the search is reasonable or not.

There is no dispute that if the deputies had fired shots at Mendez in the course of a reasonable search, this would not have been an unreasonable seizure under the balancing required in *Graham*. The Court of Appeals nevertheless held that the seizure was unreasonable in this case, merely because the *search* was unreasonable, based on a so-called "Provocation Rule" articulated in *Billington* v. *Smith*, 292 F.3d 1177, 1190–91 (9th Cir. 2002). This rule allows a court to treat an otherwise reasonable shooting as *unreasonable* if an earlier constitutional violation—in this case, failure to get a warrant—created the situation which led to the shooting. In addition to the flaws already elaborated in the Petitioners' brief, this rule is untenable for three more reasons that Petitioners only touched upon.

First, on its face, the Provocation Rule exposes law enforcement officers and the public to greater risk of injury and death by (a) requiring agents to diminish their response to violent attack and (b) condoning violence against law enforcement for violations of the right to privacy. Second, it unreasonably

expects law enforcement agents to apply a complicated calculus to determine the amount of force allowed, leaving no room for the split second decision-making required in such tense and deadly situations. Third, it discourages officers from performing their duties and completing their mission by holding them liable for the outcome of any violent confrontation that follows from any constitutional violation, foreseeable or not.

For these reasons, and others given in the Petitioners' brief, this Court should reject the Provocation Rule and apply the ordinary balancing of interests required under *Graham*.

ARGUMENT

I. The Provocation Rule improperly denies the government's interest in protecting law enforcement agents or others and puts agents at much greater risk of harm.

Law enforcement is an inherently risky profession. As this Court recognized in *Terry* v. *Ohio*, 392 U.S. 1, 23–24 (1968), "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." In 2015 over 50,000 law enforcement officers were assaulted in the line of duty in the United States. See FBI, *Law Enforcement Officers Killed & Assaulted* 2015, tbl. 70, https://ucr.fbi.gov/leoka/2015/tables/table_70_leos_asltd_region_and_geographic_division_2015.xls (last visited Jan. 19, 2017). That is nearly one tenth of all law enforcement officers in the country. See *id.*

While the rate of fatal injuries in all American occupations remained below 5 fatalities per 100,000 full-time workers every year between 2006 and 2014, police officers suffered fatalities at more than double that rate. Bureau of Labor Statistics, *Injuries, Illnesses, and Fatalities,* https://www.bls.gov/iif/oshwc/cfoi/police-officers-2014.htm#1 (last modified Aug. 2, 2016). Of the 41 law enforcement officers who died from injuries they incurred in the line of duty in 2015, nearly all of those deaths (38) resulted from firearms. See FBI, Law Enforcement Officers Killed & Assaulted 2015, tbls. 1, 28, https://ucr.fbi.gov/leoka/2015/officers-feloniously-killed/felonious_topic_page_-2015 (last visited Jan. 19, 2017).

Despite these risks, the use of force by law enforcement is rare. In "only 1.6% of all citizen-police interactions" did officers use some type of force. J. PETE BLAIR ET AL., *Reasonableness and Reaction Time,* 14 POLICE QUARTERLY 4: 323–42, 324 (2011). And law enforcement shootings are even rarer, some say "exceedingly rare." *Id.* Still, the use of force—even lethal force—is at times justified. All persons have the right "to be secure in their person[] . . . against unreasonable . . . seizures" of the person. U.S. Const. amend. IV; *Graham,* 490 U.S. at 394. But only seizures that are unreasonable. Determining whether such a seizure is reasonable involves "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee* v. *Garner,* 471 U.S. 1, 8 (1985) (internal quotations omitted)).

This Court has recognized that one of the factors that comes into play is "whether the suspect poses an immediate threat to the safety of the officers or others." *Id.* at 396. The government has a profound interest in protecting the safety of those who risk their lives on a regular basis to enforce the laws of this country, not to mention innocent bystanders. As this Court said in *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977), "[w]e think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty."

That justification is never weightier than in the situation presented here—the aiming of a firearm at law enforcement agents. Short of some grotesque scenario where law enforcement stages a violent encounter, it can never be considered unreasonable for officers to use lethal force against a person threatening their lives with a firearm. *Never*. For that very reason, there is no dispute that had the deputies possessed a warrant when they happened upon an unexpected inhabitant pointing a gun at them, their interest in using lethal force to stop the perceived shooter and prevent harm to the agents would be paramount and therefore reasonable under *Graham*.

The Ninth Circuit nevertheless concluded the shooting in this case was unreasonable under its so-called "Provocation Rule," because the officers did not either obtain a warrant or knock and announce before entering. In its strictest form, this Provocation Rule provides that when agents intentionally or recklessly provoke the attack, and that provocation is a violation of constitutional rights, the use of force that would otherwise be reasonable becomes

excessive. *Billington*, 292 F.3d at 1189, 1190. As aptly explained in the Petitioners' brief, the Ninth Circuit applied a much more liberal version of the rule in this case, one that turned the deputies' reasonable use of force into an unreasonable one merely because the constitutional violation "created a situation which led to the shooting." Pet. App. 22a.

The Provocation Rule in any form is inconsistent with *Graham*, because it involves no balancing of the relevant interests for a seizure, only those for a search, which are completely different. Pet'rs' Br. 4, 44–45. The rule applied by the Ninth Circuit is also inconsistent with the right to qualified immunity, because liability attaches regardless of whether the constitutional right at issue is well-established. Pet'rs' Br. 38.

But the more disturbing attributes of the rule are (1) the demand that law enforcement agents accept greater risk of harm and death than they already do in carrying out their duties when a violation of constitutional rights triggers violent conflict, and (2) the suggestion that those whose rights were infringed suddenly acquire a superior right to use lethal force against law enforcement. These notions logically follow if the Ninth Circuit's holding is correct under *Graham*. For the deputies' otherwise reasonable use of lethal force to become *unreasonable*, the deputies' conduct must somehow alter the balance of relevant interests so that they weigh against the deputies' use of force. The lack of a warrant and failure to follow "knock and enter" protocols had to either (1) significantly diminish the weight of the government's interest in protecting the life of agents and others, or (2) grant the individual a superior right to use lethal

force against the deputies. Obviously, neither of these propositions can be reasonably accepted.

The first proposition smacks of a penalty imposed on law enforcement for unconstitutional conduct, in the vein of an "eye for an eye." It requires law enforcement agents to forfeit some right to self-defense and accept greater risk of serious injury or death when they deny someone else's right to privacy. This tit for tat has no place in American jurisprudence. The only consequence of this requirement is a change in tactics, from shooting to retreating, and that greater risk of harm created by this rule can be avoided. At least over 30% of officer firearm fatalities occur when the suspect is within 5 feet of the officer. See FBI, *Law Enforcement Officers Killed & Assaulted 2015*, tbl. 31. The close quarters in which officers often find themselves do not allow for any other option but to subdue the violent attacker with deadly force. Moreover, common moral sensibilities cannot countenance the notion that the government's interest in the agent's safety diminishes where he or she violates a constitutional right to privacy.

The second proposition is equally perverse, if not more so. It is difficult to imagine a policy more antithetical to civil society than one that condones violent retaliation against law enforcement. But that is exactly what the Provocation Rule appears to do. To hold that the protective use of lethal force in response to a perceived violent attack is unreasonable because the attack was "provoked by" or triggered by a constitutional violation suggests there is a Fourth Amendment right to resist with violence against an invasion of constitutional rights. Those

willing to accept the risk of exercising this newfound constitutional right will do so not only when their rights are actually violated, but also whenever they *perceive* their rights to be violated. Such a policy can only be expected to increase the number of violent confrontations with law enforcement and the incidents of serious injury and death.

II. The Provocation Rule places officers at greater risk by overcomplicating the use of force calculus.

As this Court explained in *Graham*, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. Officers must already engage in a complex calculus in order to take all relevant circumstances into account when determining how much force is reasonably necessary. Requiring officers on top of that to discount the amount of force by engaging in a legal analysis of whether their conduct or that of others triggered the response and whether it was constitutional is not only unrealistic but potentially deadly for law enforcement.

A. Officers rely on well-established use of force models to avoid dangerous delay or lethal overreaction.

There are several models that guide these decisions and provide a paradigm for rapid execution. One model is the "continuum of force." This model is a "spectrum of control tactics" that an officer uses to subdue a suspect. PAUL W. BROWN, *The Continuum of Force in Community Supervision*, 58 FED. PROB.

31, 31 (No. 4, Dec. 1994). This can range from "body language and oral communications" all the way to using "lethal measures." *Id.* The goal of the use of force continuum is to "control the subject and situation, without over-reaction." *Id.* A well-trained officer facing a "critical situation . . . can mentally review the continuum of force options in a fraction of a second and come up with the proper reaction." *Id.*

A second model is the "deadly force triangle decision model." "The deadly force triangle is a decision model designed to enhance an officer's ability to respond to a deadly force encounter while remaining within legal and policy parameters." DEAN T. OLSON, *Improving Deadly Force Decision Making*, FBI L. ENFORCEMENT BULL., Feb. 1998, at 2. This model requires that three elements or sides of the triangle are present in order to "justify the use of deadly force." BRIAN R. JOHNSON, *Crucial Elements of Police Firearms Training*, 32 (2008). Each side of the triangle "must be present to justify deadly force." OLSON, *supra*, at 2. These three elements are ability, opportunity, and jeopardy. The ability prong asks whether the suspect has the ability to cause death or great bodily harm. The opportunity prong "deals with the suspect's potential to inflict death or great bodily harm." JOHNSON, *supra*, at 32. For instance, an "unarmed but very large and powerfully built suspect might have the ability to injure seriously or kill a smaller, less well-conditioned officer." OLSON, *supra*, at 2. The jeopardy prong is present when a suspect takes "advantage" of his or her "ability and opportunity to place an officer or another innocent person in imminent physical danger." *Id.*

The deadly force triangle is used in training officers. They are given a "variety of scenarios" and "must determine if and when justification for deadly force exists." OLSON, *supra*, at 2. The deadly force triangle along with the use of force continuum are the split-second calculus that officers must undertake to determine whether to use force in a given situation.

When faced with a situation requiring force, every millisecond counts. For instance, "[a]nalysis of deadly traffic stops has demonstrated that a suspect in the driver's seat can draw a weapon and fire at an officer in as little as .23 seconds (s), with an average time of .53 s." W. LEWINSKI ET AL., *Ambushes Leading Cause of Officer Fatalities—When Every Second Counts: Analysis of Officer Movement from Trained Ready Tactical Positions*, 15 LAW ENFORCEMENT EXECUTIVE FORUM 1, 2 (2015). On the other hand, an officer in such a situation, who is "faced with a complex decision-making process . . . will take an average of anywhere from .46 to .70 s to begin" his or her response. *Id.* As one study of ambushes on police officers concluded, law enforcement officers need "to be prepared to respond as quickly as possible to potentially deadly situations." *Id.* at 13.

To understand the risk officers face in prolonging their decision-making process, consider the time it takes for a trained officer to respond to a simple stimulus, a green light, when he or she has been instructed to pull the trigger on the flashing of the light. In other words, the reaction time in such ideal conditions helps to illustrate the gravity of use of force situations. A study of a simple stimulus and response, in which officers were standing with guns drawn and aware that they were to fire when they

saw a green light, illustrates the difficulties faced by officers in the much more complex situations on the streets. In that experiment, the duration between the green light being turned on and the first movement of the trigger at the beginning of the trigger pull averaged .25 seconds. See WILLIAM J. LEWINSKI ET AL., *Police Officer Reaction Time to Start and Stop Shooting: The Influence of Decision-Making and Pattern Recognition*, 14 LAW ENFORCEMENT FORUM 1 (2014).

The above study demonstrated the reaction time in "perfect" conditions. Thus, reaction time in real world circumstances involving "many stimuli at once" is "much more complex" especially given that "these stimuli are often high stress inducing." *Id.* at 2. Accordingly, in real life, "reaction time, which includes decision processes, is greatly increased in comparison to when only one or two action choices are present." *Id.*

Indeed, in one study of more complex circumstances, officers encountered armed suspects. The suspects were aiming their guns down—not at the officers—while the officers had their guns aimed at the suspect. The study then had the suspect either surrender or attempt to shoot the officer. The study examined the "speed with which the officer fired if the suspect chose to shoot." BLAIR, *supra* at 323. The results of the study were not encouraging for law enforcement officers. "[O]fficers were generally not able to fire before the suspect." *Id.* As the researchers concluded, the "process of perceiving the suspect's movement, interpreting the action, deciding on a response, and executing the response for the officer generally took longer than it took the suspect to

execute the action of shooting, even though the officer already had his gun aimed at the suspect." *Id.* at 336.

B. The Provocation Rule puts officers at greater risk by adding unnecessary complexity to the use of force calculus.

The Ninth Circuit's Provocation Rule injects another level of complexity and analysis into this process. Instead of determining whether the threat posed by a suspect in the moment justifies or even necessitates the use of deadly force, the Ninth Circuit's rule requires an officer to analyze the circumstances that led to that moment. The officer is required to ask whether his or her actions—or the actions of other officers—may have caused the threat posed by the suspect and whether those actions were constitutional. Instead of a deadly force triangle, the Ninth Circuit effectively asks officers to apply a deadly force square. An additional factor or side that officers must consider is whether their own or others' actions "intentionally or recklessly" caused the "violent confrontation." *Billington*, 292 F.3d at 1189. If they did, then even if the other three sides—ability, opportunity, and jeopardy—are present, the officer may be required to stand down and use something less than deadly force.

This will put officers (and the public) at risk for two related but independent reasons. First, by adding a layer of complexity to the already complex decision-making process whether to use force, the Ninth Circuit's rule necessarily will increase the reaction time of officers. As demonstrated above, every millisecond counts in the life-and-death situations faced by officers. Officers will take longer

to make the difficult decision to use lethal force. This increase in time will put the lives of officers and the public in graver danger than they already are.

Second, the Provocation Rule will lead officers to stand down and refrain from using force when it is justified because of their fears and concerns that they may have contributed to the violent confrontation. While a suspect's threat may well justify the use of lethal force, officers will have the seed of doubt planted in their minds. They will ask whether their actions may have contributed to the situation. And given that the Ninth Circuit's Provocation Rule dispenses with normal proximate-cause analysis, see *infra*, II.B., this is all the more likely. This will put officers' lives at risk—and the lives of the public too.

C. The Provocation Rule discourages law enforcement from completing the mission after even the most technical violation has occurred.

Because the Provocation Rule eliminates the proximate-cause analysis, it significantly alters the calculus for law enforcement agents in yet another way. Under ordinary tort principles, an officer's potential liability for a constitutional tort is readily apparent because the proximate-cause principle limits liability to the direct and foreseeable consequences. The Provocation Rule overrides that element and makes officers automatically liable for the outcome of any violent confrontation that follows from their constitutional tort, foreseeable or not.

As Petitioners point out (Pet'rs' Br. 40–42), this Court has held that under Section 1983 common law tort principles of damages and causation apply. See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306, 308 (1986). That includes the principle of

proximate causation. *Malley* v. *Briggs*, 475 U.S. 335, 344 n.7 (1986). "[A] proximate cause . . . means that it was not just any cause, but one with a sufficient connection to the result." *Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014). While proximate cause is "'a flexible concept,'" it "generally 'refers to the basic requirement that . . . there must be some *direct* relation between the injury asserted and the injurious conduct alleged.'" *Id.* (internal citations and quotation marks omitted) (emphasis added). Requiring "proximate cause . . . serves, inter alia, to precl le liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.*

As one treatise puts it, a plaintiff in a "tort case must show that the wrongdoing is both a cause in fact and a proximate cause of the injuries" suffered. 74 AM. JUR. 2D TORTS § 27. This means that the plaintiff bears the burden of showing "(1) that without the misconduct, the injury would not have occurred, commonly known as the 'but for' rule; (2) that the injury was the natural and probable result of the misconduct; and (3) that there was no efficient intervening cause." *Id.*; see also DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 198 (2d ed. 2014) (a defendant "is not a proximate cause of, and therefore not liable for, injuries that were unforeseeable). The Ninth Circuit's Provocation Rule collapses this distinction. Indeed, the Provocation Rule explicitly cuts out any sort of proximate-cause analysis. The rule states that "where an officer intentionally or recklessly provokes a violent confrontation . . . he may be held liable for his otherwise defensive use of deadly force" so long as that "provocation is an independent Fourth Amendment violation." *Billington*, 292 F.3d at 1189.

Thus, even where "officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force." *Id.*

This is a but-for causal analysis. There is no inquiry into whether the violent confrontation was a "natural and probable result of the misconduct," nor is there any analysis of whether there was any sort of intervening cause. Rather, the Ninth Circuit's test simply asks whether the intentional or reckless violation of the Constitution was the cause *in fact*—i.e., the but-for cause—of the violent confrontation.[2]

The effect of this will be deadly. Officers will be discouraged from following through on their duties to protect and safeguard themselves and the public. If the Provocation Rule stands, an officer who realizes that his entry onto property was unconstitutional but who then discovers an armed man pointing a gun at him or her, will be incentivized to retreat or withhold fire. Otherwise, if he shoots and hurts or kills the suspect, he likely will be liable for any injury. It was, after all, his unconstitutional entry onto the property that gave rise to the violent confrontation. That cannot be the law. This is yet another reason that the Ninth Circuit's decision should be reversed.

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[2] The Ninth Circuit's opinion in this case is not even subtle about collapsing this distinction. Indeed, the Ninth Circuit's decision recognized that the Provocation Rule does not include a proximate-cause analysis when it applied the proximate-cause analysis separately from the Provocation Rule. See App. 24a.

CONCLUSION

For the reasons given above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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JANUARY 2017

RECORD AND BRIEFS

FILED
FEB 23 2017

No. 16-369

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE POLICY COUNCIL ON LAW ENFORCEMENT AND THE MENTALLY ILL, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons.

Since its inception, the NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. In 2014, the NAACP published a report entitled *Born Suspect*, which provides important research and information regarding how the criminal justice system in our nation disproportionately harms African Americans and other communities of color. The NAACP advocates for fairness in policing procedures, for police accountability for wrongful conduct, and for just compensation for the victims of police misconduct.

Amicus Policy Council on Law Enforcement and Mental Illness is an association of individuals and organizations who share a common interest in improving the interface between law enforcement and the mentally ill. Amicus members are all

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

persons or organizations representing people that either suffer with, have family members who suffer with, or are dedicated to improving life circumstances for those with mental illness. In this context, mental illness refers to organic disorders that manifest themselves in some non-volitional behavioral symptoms.

As individuals, many Council members live under the weight of public indifference, prejudice and stigma. As a group, however, they actively engage in law enforcement policymaking by advocating before appropriate public bodies to advance tactics and techniques for dealing with people with mental illness. The platform by which the Council obtains standing before such public bodies has been, in large part, the requirement that governmental entities ensure their policies make reasonable accommodations to persons with disabilities under the Americans with Disabilities Act. The Council therefore advocates for the implementation of policies which result in reasonable accommodations for people with mental illness. In addition, the Council seeks to advance legal principles that affirm police accountability and promote responsible police conduct. Any decision which undermines or limits law enforcement accountability will undermine the Council's effectiveness on behalf of its constituents.

SUMMARY OF ARGUMENT

This Court's excessive force cases have consistently accounted for *all* of the relevant facts and circumstances and have not held that certain

salient facts should be ignored for purposes of Fourth Amendment analysis. The approach advocated by Petitioners, by which excessive force claims would be judged solely by looking at the circumstances at the *moment* force was used, would signify a retreat from this Court's Fourth Amendment precedents, incentivize police to disregard the Fourth Amendment, and endanger public safety.

The outcome reached below by the district court and affirmed by the Court of Appeals is consistent with the dictates of *Graham* and *Garner*. Moreover, the combination of the officers' wrongdoing and the victims' absence of wrongdoing make this case a poor vehicle for announcing a rule that functions to shrink the scope of officer liability. Under Petitioners' approach, entirely innocent victims who did not know they were dealing with police officers and who sustained permanently disabling injuries from the officers' use of deadly force, would be without a remedy. Such a result is at odds with this Court's precedents. When officers cause people to be subjected to deadly force in circumstances that are objectively unreasonable and of the officers' own making, the Fourth Amendment holds them accountable.

This Court has observed that the failure of police to announce their presence before forcing entry into a home can endanger the lives of occupants and officers alike. The Court has also acknowledged the importance of deterring such entries and recognized the role that civil liability plays to this end. However, this deterrent effect

would be greatly diminished if the Court should hold, as Petitioners urge, that culpable conduct on the part of police officers is "not relevant" for purposes of assessing the reasonableness of a particular use of force. Such an approach would be at odds with *Graham* and *Garner*, which held that the salient "question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."

This Court has also repeatedly recognized the important role its decisions play in incentivizing law enforcement to conduct themselves in accord with the Fourth Amendment. A verdict for the unlawful entry alone will not vindicate the Mendezes' Fourth Amendment rights or incentivize police officers in the future to respect the "firm," "bright" line this Court has drawn at the entrance to a house.

People of color will be among those to most acutely feel the effect of any decision that retreats from the Court's traditional totality of circumstances analysis, particularly in the context of facts like these. Social science research indicates that implicit bias poses its greatest danger when officers are faced with making split-second judgments about the use of deadly force in circumstances that are tense, uncertain, and rapidly-evolving, and that people of color are more likely to be perceived as deadly threats in such situations. It is thus critical for the safety of people of color in this country that this Court acknowledge and account for the emerging literature on implicit bias when crafting rules effecting the lawful use of force.

It is likewise important to the safety of people with mental illness that the constitutional framework for excessive force claims not retreat from a totality of the circumstances approach. If a court is focused solely on the *moment* force is used, with no regard for the preceding circumstances, then force used against such individuals will almost never be deemed unreasonable.

People suffering from mental illness will be acutely vulnerable to the impact of any decision that extends the principle of immunity for the proximate consequences of unannounced, forcible entries into a home. They are more likely to have difficulty comprehending an unannounced entry, and many are likely to react in ways that will prompt officers to feel the need to employ deadly force. Officers often reasonably misinterpret the behavior, demeanor, and intentions of people with mental illness or disability, and an officer's show of force to a mentally disturbed individual will not always have the intended effect. These factors help account for the fact that a significant number of those killed by police officers in the United States die while in the midst of a mental health crisis.

ARGUMENT

I. *GRAHAM* AND *GARNER*'S 'TOTALITY OF THE CIRCUMSTANCES' INQUIRY IS MORE EQUITABLE TO PERSONS SUBJECTED TO POLICE FORCE THAN THE APPROACH PROPOSED BY PETITIONERS, AND IT INCENTIVIZES OFFICERS TO ACT IN ACCORDANCE WITH THE FOURTH AMENDMENT IN A WAY THAT PETITIONERS' APPROACH WOULD NOT.

As organizations that advocate for the interests of groups historically subjected to disproportionate levels of police force, amici know firsthand the critical role that civil liability plays in deterring dangerous police practices. For reasons explored below, see *infra* Parts II–III, amici are deeply concerned that the approach advocated by Petitioners, by which excessive force claims would be judged by looking only to the circumstances in the *moment* force was used, leaves people of color and people with mental illness particularly vulnerable.

This Court's excessive force cases have consistently accounted for *all* of the relevant facts and circumstances and have not held that any should be ignored for purposes of Fourth Amendment analysis. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). Under the "totality of the circumstances" approach the Court has followed, factors that militate against the use of force matter. For example, there is a difference between an individual who both clearly intends and has the

means to do harm to an officer, and an individual who is known to be mentally ill and perhaps has the means but no such intent. That difference often may not be determinative as to the objective reasonableness of an officer's use of force, but it matters.

Amici submit that the outcome reached by the district court and affirmed by the Court of Appeals is consistent with the dictates of *Graham* and *Garner*, and that the combination of the officers' obvious wrongdoing and the victims' absence of wrongdoing make this case a poor vehicle for announcing a rule shrinking the scope of officer liability. Indeed, it would send a disturbing message if this Court were to hold that innocent people, shot in their own home by police officers who had no right to be there, are without meaningful recourse for the life-threatening injuries they suffer. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Amici urge this Court to reject any rule that leads to such inequitable and bizarre results.

. . .

Angel Mendez and his wife, Jennifer, were minding their own business, laying on a futon inside their home, in legal possession of a BB gun that happened to be "inadvertently" pointed at their front door. Two officers, who knew the Mendezes lived in the home, chose not to announce themselves, unlawfully entered, instantly perceived the

Mendezes as a threat, and fired fifteen rounds at them without a warning or an opportunity to surrender. Five shots struck Mr. Mendez, in the back, hip, arm, shin, and foot. *See* Pet. App. 70a. As a result, his right leg had to be amputated below the knee. *Id.* Two shots struck Jennifer Garcia (now Mendez), who was seven months pregnant, one of them in the back. *Id.* The shots were fired in rapid succession, and at no point did the officers pause to reassess the need for continuing the use of deadly force. The Ninth Circuit observed that it was "quite debatable" whether "the officers were . . . plainly incompetent[.]" *Mendez v. Cnty. of Los Angeles*, 815 F.3d 1178, 1188 (9th Cir. 2016).

The district court found that the officers failed to announce their presence, unlawfully opened the door to the home, and "almost immediately" fired fifteen shots. *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *11–16 (C.D. Cal. Aug. 13, 2013). The court concluded their actions amounted to "unreasonable, excessive force." *Id.* at *89. The Court of Appeals later affirmed that the deputies were "liable for the shooting as a foreseeable consequence of their unconstitutional entry," *Mendez*, 815 F.3d at 1195, even if "at the moment of [the] shooting" their decision to shoot was "reasonable." *See Mendez*, 2013 U.S. Dist. LEXIS 115099, at *65.

Petitioners and various amici police agencies now seize on the lower courts' conclusion that the split-second decision to shoot was not unreasonable, as a means of asking this Court to limit damages

solely to the warrantless entry, and to establish a larger precedent that would shield officers from liability for foreseeable injuries resulting from unannounced home entries that violate the Fourth Amendment. *See id.* at *87 ("In this case, it was foreseeable that opening the door . . . without knocking-and-announcing could lead to a violent confrontation."). Under the approach advocated by Petitioners, entirely innocent victims who did not know they were dealing with police officers and who sustain permanently disabling injuries from the officers' use of deadly force, would be without a remedy.

The foreseeability of the Petitioners' entry provoking a face-to-face confrontation in which the officers would feel the need to use deadly force is simply one of the "facts and circumstances" to be considered as part of the Fourth Amendment's "totality of the circumstances" reasonableness inquiry.[2] *See Graham v. Connor*, 490 U.S. 386, 396

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[2] Amici submit the following "facts and circumstances" are also relevant for purposes of assessing the reasonableness of their use of force: The officers made an unannounced, warrantless entry into the Mendezes' home. *See Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (stating "a search or seizure of a dwelling might be constitutionally defective if police officers enter without a prior announcement"). The officers knew the Mendezes lived inside the home, but they gave them no opportunity to surrender or avoid being shot. *Cf. Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) ("[I]f the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, *where feasible, some warning has been given*." (emphasis added)). The Mendezes committed no crime. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating that the "'test of reasonableness under the Fourth Amendment' . . . requires careful attention to . . .

(1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)); *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) ("Although [the] attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"); *id.* at 386 (Ginsburg, J., concurring) ("Among relevant considerations: Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?"). Here, the officers' use of force cannot be divorced from their contemporaneous, unannounced entry into the home. The provocation rule employed below is simply a mechanism for evaluating the constitutionality of police actions that foreseeably create a need for the use of force. What is important is that the officers caused the Mendezes to be subjected to deadly force in circumstances that were objectively unreasonable and of the officers' own making. The Fourth Amendment holds them accountable for that.

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severity of the crime at issue" (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The officers fired fifteen rounds into a small, enclosed space, while the Mendezes fired none. *See, e.g.*, *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (holding that even "when an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot any time thereafter with impunity"). In their totality, these facts reasonably account for the trial court's holding that the officers used "unreasonable, excessive force," see *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *89 (C.D. Cal. Aug. 13, 2013), irrespective of the lower courts' provocation analysis.

A. *Graham* and *Garner*'s focus on the 'totality of the circumstances' permits courts to account for officers' actions giving rise to a use of force and is more equitable to persons subjected to force than the narrow reading advocated by Petitioners.

Graham and *Garner*'s focus on the *totality* of the circumstances permits courts to account for both the absence of wrongdoing on the part of persons subjected to force, as well as the actions of police officers that unnecessarily create the need for force. This is of significant consequence to people of color and people with mental illness, who, for reasons discussed *infra*, Parts II and III, have historically been disproportionately impacted by police use of force. Petitioners assert that Mr. Mendez's possession of the BB gun is essentially the *only* thing that matters and that the officers' conduct just prior to the moment they opened fire is flatly "not relevant." Pet. Br. at 16, 23–24. *But see Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) (stating "the mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force"); *accord Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015); *Bennett v. Murphy*, 274 F.3d 133, 135 n.2 & 136 (3d Cir. 2001). However, given the totality of the circumstances, it would be deeply inequitable if Mr. Mendez's lawful possession of a BB gun in the privacy of his own home, particularly when he was never given an opportunity to disarm, was deemed sufficient to break the chain of causation for an excessive force claim and effectively

shield the officers from liability for the shooting. *Cf. Scott v. Harris*, 550 U.S. 372, 385–86 (2007) (stating that "Constitution assuredly does not impose [an] invitation to impunity-earned-by-recklessness"). Taken to its logical conclusion, if Petitioners are right, and the "only" issue that matters is "what happened at the moment of the shooting," see Pet. Br. at 23–24, then police could never be liable for excessive force for shooting a person in their own home if the person possessed a gun, no matter how unreasonable the officer's conduct might have been. *But see District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (affirming right to possess handguns in "the home, where the need for defense of self, family, and property is most acute"). This narrow reading of this Court's precedents offers no meaningful path of relief to persons like the Mendezes, who suffered life-altering injuries through no fault of their own.

In *Scott*, another case concerning police use of deadly force, the Court said that it was "loath to lay down a rule" that would privilege those who act "recklessly . . . [and] put other people's lives in danger." *Id.* at 385. In assessing the officer's use of deadly force, the Court thought it "appropriate . . . to take into account not only the . . . lives at risk, but also their *relative culpability*," and concluded that the equities weighed against the party "who intentionally placed himself . . . in danger by unlawfully engaging in [a] reckless [action] . . . that ultimately produced the choice" for the officer to use deadly force. *Id.* at 384 (emphasis added). The Court was referring at the time to criminal suspects who act recklessly and are killed by police officers.

However, the same should certainly be true of police officers themselves. *Cf. Heffernan v. City of Patterson*, __ U.S. __, 136 S. Ct. 1412, 1418 (2016) ("[I]n the law, what is sauce for the goose is normally sauce for the gander."). It would be inequitable to consider the "relative culpability" of someone subjected to deadly force by police, but to ignore police officers' own culpability when they create the need for deadly force, particularly in cases where the victims had engaged in no wrongdoing. When officers illegally enter someone's home, do not announce themselves as police, afford the residents no chance to surrender, and then employ deadly force against them, to the point of firing fifteen shots when there is no return fire, they are acting recklessly, and they should be held accountable.

B. *GRAHAM* AND *GARNER*'S 'TOTALITY' ANALYSIS INCENTIVIZES OFFICERS TO ACT IN ACCORDANCE WITH THE FOURTH AMENDMENT IN A WAY THAT PETITIONERS' APPROACH WOULD NOT.

In *Hudson v. Michigan*, the Court observed that the failure of police to announce their presence before forcing entry into a home can endanger the lives of occupants and officers alike. *See* 547 U.S. 586, 593–94, 596 (2006) (observing that the announcement rule is rooted in the protection of human life). The Court specifically acknowledged the importance of deterring such entries, but stated, "[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts." 547 U.S. at 598.

Indeed, the prospect of civil liability is perhaps the most significant available deterrent against the practice. It is one of the reasons this case has significant public safety implications, particularly for people of color and persons with mental illness, who are more likely to be perceived as dangerous and be subjected to deadly force when officers are faced with making split-second decisions. *See infra* Parts II & III. "It is almost axiomatic that the threat of damages has a deterrent effect[.]" *Carlson v. Green*, 446 U.S. 14, 21 (1980). If the Court were to hold that officers are not liable for the foreseeable consequences of unannounced home entries that violate the Fourth Amendment, these entries are likely to occur with greater frequency. *See generally* Myriam E. Giles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (discussing deterrent effect of constitutional tort damages on behavior of governmental actors); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–88 (1991) (discussing the "systemic function" damages play in Fourth Amendment cases by "exert[ing] significant pressure on government and its officials to respect constitutional bounds").

Following the Court's determination in *Hudson* that an officer's failure to knock-and-announce does not trigger the exclusionary rule, see *Hudson*, 547 U.S. at 599–600, numerous Courts of Appeal applied the principle in cases where an unannounced entry into a home was accompanied by excessive force. *See United States v. Garcia-*

Hernandez, 659 F.3d 109, 113–14 (1st Cir. 2011) (stating "*Hudson* is categorical and that the amount of force used in effecting a no-knock entry does not alter that reality." (citing *United States v. Ankeny*, 502 F.3d 829, 833, 835–38 (9th Cir. 2007); *United States v. Watson*, 558 F.3d 702, 704–05 (7th Cir. 2009)). This development has only reinforced the need for meaningful deterrents against such entries.

In addition to civil liability, *Hudson* suggested that "the increasing professionalism of police forces" could help "deter[] civil-rights violations" with respect to the failure of officers to announce their presence. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006). However, as this Court has recognized, police officers sometimes see strategic value in making entry into a home unannounced. *See Wilson v. Arkansas*, 514 U.S. 927, 934–36 (1995) (discussing multiple "countervailing" law enforcement considerations). Police professionalism does not appear to have made these entries occur with less frequency. If anything, there have been more than ever. *See generally*, American Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014) (documenting the rise of SWAT-like tactics in American policing). Drug cases, in particular, tend to afford officers vast discretion in making entry into a person's home, and they have increasingly used that discretion to make sudden, violent entries, often utilizing paramilitary tactics. *Id.* at 24.

The deterrent effect of civil liability will be greatly diminished if the Court should hold that culpable conduct on the part of police officers is, as

Petitioner's urge, "not relevant" for purposes of assessing the reasonableness of a use of force following an unannounced entry. Pet. Br. at 16, 23–24. Such a holding would also mark a significant retreat from *Graham* and *Garner*, which held that the salient "question is 'whether the *totality* of the circumstances *justifie*[*s*] a particular sort of . . . seizure." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)) (emphasis added). If officers were to understand that certain "facts and circumstances," to include their own culpable conduct, are no longer relevant for purposes of assessing the reasonableness of force, they will feel significantly less incentive in the context of home entries to get a warrant, announce their presence, or otherwise comport themselves with the Fourth Amendment. Such a development would endanger public safety.

This Court has repeatedly recognized the important role its decisions play in "incentiv[izing] . . . the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (citing *Dunaway v. New York*, 442 U.S. 200, 221 (1979) (Stevens, J., concurring)). The Court has remained cognizant of the real world consequences of its doctrines, and has been careful not to create "incentive[s] to . . . violate the . . . Fourth Amendment[.]" *Brendlin v. California*, 551 U.S. 249, 263 (2007). In criminal law, the Court has affirmed the exclusionary rule "to deter—to compel respect for the constitutional guaranty [of the Fourth Amendment] . . . by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206,

217 (1960). The Court has said the operation of such "incentive[s] to avoid Fourth Amendment violations . . . [prevents] the constitutional guarantee against unlawful searches . . . [from] be[ing] reduced to 'a form of words.'" *Oregon v. Elstad*, 470 U.S. 298, 337 n.15 (1985) (quoting *Brown v. Illinois*, 422 U.S. 590, 602–03 (1975)). The Court has also acknowledged a public interest in deterring reckless police conduct that violates the Fourth Amendment. *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 238 (2011) ("When the police exhibit . . . reckless . . . disregard for Fourth Amendment rights, the deterrent value of exclusion is strong[.]") (quoting *Herring v. United States*, 555 U.S. 135, 143–44 (2009)).

The officers' conduct here was reckless as a matter of law. *Mendez v. Cnty. of Los Angeles*, No. CV 11-04771-MWF (PJWx), 2013 U.S. Dist. LEXIS 115099, at *97 (C.D. Cal. Aug. 13, 2013). It was entirely foreseeable that the Petitioners' "unannounced entry [might] provoke violence." *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). A one dollar verdict for the unlawful entry will not vindicate the Mendezes' Fourth Amendment rights or incentivize police officers to respect the rule that "draw[s] a 'firm line at the entrance to the house.'" *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

II. PEOPLE OF COLOR ARE DISPROPORTIONATELY KILLED BY POLICE, AND THEY WILL DISPROPORTIONATELY BEAR THE BURDEN OF ANY DECISION THAT MAKES UNANNOUNCED HOME ENTRIES—AND THE ATTENDANT SPLIT-SECOND, LIFE-OR-DEATH JUDGMENTS—BY POLICE MORE LIKELY TO OCCUR.

People of color will be among those to most acutely feel the effect of any decision that retreats from a totality of the circumstances analysis, particularly in the context of facts like these. This is in part because the sudden, split-second judgements occasioned by the type of entry that was made in this case provide fertile ground for the pernicious influence of implicit bias. *See United States v. Mateo-Medina*, No. 14-2862, 2017 U.S. App. LEXIS 342, at *12–13 (3d Cir. Jan. 9, 2017) (discussing operation of implicit bias "in situations that require rapid decision-making"). The science of implicit racial bias indicates that unconscious mental processes of perception, impression, and judgment are influenced by powerful cultural stereotypes that can function to produce behavior at odds with an individual's avowed principles. *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (surveying implicit bias research). "[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans." *Id.* at 966.

As Justice Sotomayor recently observed, "it is no secret that people of color are disproportionate

victims" of "the humiliations of . . . unconstitutional searches." *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing M. ALEXANDER, THE NEW JIM CROW 95–136 (2010)). Implicit bias appears to play a significant role in explaining these disparities. Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 499 (2015); Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 906–09 (2014); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 382 (2007). In fact, research suggests the phenomenon impacts a range of police activities. *See United States v. Mateo-Medina*, No. 14-2862, 2017 U.S. App. LEXIS 342, at *11–13 (3d Cir. Jan. 9, 2017) (citing "recent research indicating that police are more likely to stop, and arrest, people of color due to implicit bias"). Understanding the stakes, the U.S. Department of Justice recently announced that "it will train all of its law enforcement agents and prosecutors to recognize and address implicit bias as part of its regular training curricula." U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFF., *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel* (June 27, 2016), https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel.

However, implicit bias poses its greatest danger when "police officers [are] . . . forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly-evolving—about the [use] of force." *Graham v. Connor*, 490 U.S. 386, 397 (1989). "Extensive research has shown that in such situations the vast majority of Americans of all races

implicitly associate black Americans with adjectives such as 'dangerous,' 'aggressive,' 'violent,' and 'criminal.' " THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE U.N. HUMAN RIGHTS CMTE. REGARDING RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 4 (Aug. 2013); *see generally*, Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016) (exploring how social cognitions, including implicitly held associations, lead to police violence against African-Americans).

Implicit bias helps account for "evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans" by police officers in the United States. *See* Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS ONE (Nov. 2015), http://dx.doi.org/10.1371/journal.pone.0141854. According one analysis, "the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average." *Id.*; *see also* J. Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY J. PUB. POL. 1, 1 (2017) (conducting multivariate regression analysis of 990 fatal police shootings in 2015 and concluding "Black civilians [shot by police] were more than twice as likely as White civilians to have been unarmed"). Other analyses lend support to the conclusion that people of color are more likely to be perceived as deadly threats by officers faced with making "split-second" judgments, such as occurred in this case.

See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002) (finding that when a "target was unarmed, participants mistakenly shot him more often when he was African American than when he was White"); Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 J. PERSONALITY & SOC. PSYCHOL. 1139, 1146 (1995) (identifying "aggressiveness" as a trait frequently associated with Blacks and concluding "that there is a clear, consistent contemporary stereotype of Blacks . . . that . . . is highly negative in nature"). In simulated shooting experiments, officers have "exhibited robust racial bias in response speed" when confronted with "decisions to shoot (or not shoot) Black and White targets." Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007).

In the real world, these biases have deadly consequences. Justice Sotomayor reflected on the mortal danger they pose in her dissent in *Strieff*, writing that, "[f]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of a fear of how an officer with a gun will react to them." *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (citations omitted). Elsewhere, this Court has recognized that the "problem of disparate

treatment is real" and has been "validated by law enforcement investigations into their own practices." *Illinois v. Wardlow*, 528 U.S. 119, 133 & n.10 (2000) (quotation omitted). In fact, numerous courts have recognized that people of color in this country face "the recurring indignity of being racially profiled." *Massachusetts v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016); *Ligon v. City of N.Y.*, 925 F. Supp. 2d 478, 496 (S.D.N.Y. 2013) (finding that young black men face routine and pervasive "indignities," including illegal and invasive searches, at the hands of the NYPD). The absence of a Fourth Amendment remedy for intentionally discriminatory treatment has "enable[d] artifice and abuse by law enforcement, with [a] disproportionate effect on racial minorities." *United States v. Magallon-Lopez*, 817 F.3d 671, 677 (9th Cir. 2016) (Berzon, J., concurring); *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.").

"Racial profiling is generally understood to mean the improper use of race as a basis for taking law enforcement action." *Chavez v. Ill. State Police*, 251 F.3d 612, 620 (7th Cir. 2001); *see also* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 168 n.24 (surveying legal definitions). Some departments, however, walk a fine line and instruct their officers that so long as they are not treating someone differently "*solely* because of [their] race," they are not engaged in racial profiling. *Melendres v. Arpaio*, 989 F. Supp. 2d

822, 849 (D. Ariz. 2013) (emphasis added). These distinctions matter, and people's lives depend on them. Permitting officers to account for an individual's race or zip code when deciding what weapons to use, whether to knock-and-announce, or whether to provide an opportunity to surrender before overwhelming with force, leaves people of color and the poor acutely vulnerable. Even departments that strictly guard against profiling must work hard not to let implicit bias impact their objective assessment of a person's likely dangerousness.

Indeed, patterns of SWAT team deployment—a rough proxy for officers' estimation of a subject's dangerousness—are suggestive of implicit and institutional bias. Racial minorities make up the majority of those subjected to forceful home entries made pursuant to warrants by SWAT teams, with the majority (60%) of such entries made in the course of drug investigations. *See* American Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 3, 36 (2014). Meanwhile, just 22% of persons impacted by deployments that targeted an active shooter, hostage-taker, or barricade situation were minorities. *Id.* at 36. Not only do these home entries disproportionately impact blacks and Latinos, but the equipment and training officers receive in many cases "encourages them to adopt a 'warrior' mentality and think of the people they are supposed to serve as enemies." *Id.* at 3; RADLEY BALKO, *Overkill: The Rise of Police Paramilitary Raids in America*, CATO INST. 17 (2006) ("Twenty-five years of an infusion of military hardware, training, and

tactics has . . . trained police officers—particularly SWAT officers and drug police—to adopt the win-at-all-costs mentality of a soldier."); *see generally* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2014) (an in-depth exploration of a "creeping battlefield mentality that has isolated and alienated American police officers"). This mentality often inspires unannounced and poorly considered entries into the homes of innocent Americans, with tragic results. *See, e.g.*, Tina Chen, *Baby in Coma After Police Grenade Dropped in Crib During Drug Raid*, ABC NEWS (May 30, 2014), http://abcnews.go.com/blogs/headlines/2014/05/baby-in-coma-after-police-grenade-dropped-in-crib-during-drug-raid/ (describing no-knock raid that uncovered no drugs but grievously injured an infant).

The instant case, of course, did not involve a SWAT entry. But the decision here stands to have significant ramifications for any police officer engaged in an unannounced forcible home entry. The Court has previously held that "the Fourth Amendment draws a 'firm line at the entrance to the house.' That line, we think, must be not only firm, but also bright . . . ." *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 589–90 (1980)); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). This case represents an opportunity to either reaffirm or to back away from that firm, bright line.

It is critical for the safety of people of color in this country that this Court acknowledge and account for the emerging literature on implicit bias when crafting rules affecting the lawful use of force. *See Pippen v. Iowa*, 854 N.W.2d 1, 33 n.9 (Iowa 2014) ("Implicit-bias research and its application to legal theories has been thoroughly reviewed in legal scholarship."). Because people of color are more likely to be targeted by forced home entries, and because implicit bias is at its most acute "in situations that require rapid decision-making," where officers are most likely to "implicitly associate black Americans with . . . dangerous[ness], aggressive[ness], violen[ce], and criminal[ity]," *Mateo-Medina*, 2017 U.S. App. LEXIS 342, at *12–13 (quotations omitted), it will be they, as well as Latinos like the Mendezes, who will disproportionately bear the burden of officers' mistaken judgments to use deadly force. *Cf. Villegas v. Metro. Gov't*, No. 3:09-0219 U.S. Dist. LEXIS 135110, at *23–24 (M.D. Tenn. Sep. 20, 2012) (noting Vanderbilt study demonstrating "that most Americans, despite their best intentions, harbor a negative bias against Latino immigrants" that "influence [their] judgments and behavior").

III. PEOPLE WITH MENTAL ILLNESS ARE MORE LIKELY TO HAVE DIFFICULTY COMPREHENDING AN UNANNOUNCED HOME ENTRY BY POLICE, MORE LIKELY TO RESPOND IN WAYS POLICE DEEM THREATENING, AND WILL DISPROPORTIONATELY BEAR THE BURDEN OF ANY DECISION THAT MAKES SUCH ENTRIES MORE LIKELY.

It is important to the safety of people with mental illness that the constitutional framework for excessive force claims not retreat from a totality of the circumstances approach. If the focus is solely on the *moment* force is used, with no regard for the preceding circumstances, force used against such individuals will almost never be deemed unreasonable. A large number of police interactions with people with mental illness do not involve any allegation of criminal wrongdoing but rather occur in response to calls for assistance stemming from some mental crisis. Although this alone does not forbid officers from using force if the need arises, it is a factor that weighs against it.

People suffering from mental illness will be acutely vulnerable to the impact of any decision that extends the principle of immunity for the proximate consequences of unannounced, forcible entries into a home. They are likely to have more difficulty comprehending an unannounced entry, and many are likely to react in ways that will prompt officers to feel the need to employ deadly force. *Cf. Allen v. Muskogee*, 119 F.3d 837, 844 (10th Cir. 1997) (reversing grant of summary judgment in favor of City, citing evidence that "approaching and trying to

grab a gun from an emotionally disturbed . . . person created a high risk of death for officers, the armed person, and other civilians, and was reckless"). Police officers are more likely to have difficulty assessing a person's dangerousness if they are mentally ill. *Cf. Heller v. Doe*, 509 U.S. 312, 323–24 (1993) ("Prediction of future behavior is complicated . . . by the difficulties inherent in diagnosis of mental illness."). Moreover, an officer's show of force to a mentally disturbed individual will not always have the intended effect and in many cases can "exacerbate the situation." *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001); *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1227 (9th Cir. 2014), *rev'd in part*, __ U.S. __, 135 S. Ct. 1765, 1778 (2015).

People with mental illness behave in ways that are predictably unpredictable. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on . . . likelihood of future dangerousness."). Research indicates that the general public strongly associates people with mental illness with violence and danger. Jo C. Phelan & Bruce G. Link, *Fear of People with Mental Illness*, 45 J. HEALTH & SOC. BEHAV. 68, 76 (Mar. 2004). Those in law enforcement are no exception; "officers tend to perceive [them] as particularly dangerous, and . . . calls involving persons with mental illnesses may be more likely to result in injuries to officers or the person with mental illness." Amy C. Watson, PhD. et al., *Understanding How Police Officers Think About Mental/Emotional Disturbance Calls*, 37 INT'L J. L. PSYCHIATRY 351 (2014) (citing J. Ruiz, *An Interactive Analysis*

Between Uniformed Law Enforcement Officers and the Mentally Ill, 12 AM. J. OF POLICE 149 (1993); G. Cordner, *People with Mental Illness*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (2006)). A heightened expectation of danger can cause officers "to approach in a manner that contributes to the escalation of violence in the encounter and the need to respond with physical force." Watson, *supra* at 351. (citing Ruiz, 1993). In addition, "police officers may be more likely to view common objects, such as a chair, as a potential weapon," when those objects are in the vicinity or possession of a person with mental illness. Watson, *supra* at 351.

In the kind of "split-second" encounters as occurred in this case, however, where police make a sudden, unannounced entry into a home with weapons drawn and confront an alarmed homeowner, who might lack the cognitive ability to immediately comprehend the reality of the situation, an individual's mental illness may not be apparent to the officer prior to the moment they deem it necessary to employ deadly force. Officers often reasonably misinterpret the behavior, demeanor, and intentions of people with mental illness or disability. Such persons "can appear to be ignoring an officer when really they might not understand the officer's instructions." *Id.* (citing Cordner, 2006). Certain symptoms "can exacerbate a hostile demeanor or the appearance of resistance[.]" *Id.* (citing J. MacDonald, et al., *Police Use of Force: Examining the Relationship Between Calls for Service and the Balance of Police Force and Suspect Resistance*, 31 J. CRIM. JUSTICE 119, 119–27 (2003)). At the same time, those with mental illness are more

likely to resist arrest, and consequently, more likely to experience higher levels of police force. *See id.* (citing R.R. Johnson, *Suspect Mental Disorder and Police Use of Force*, 38 CRIM. JUSTICE AND BEHAV. 127, 127–45 (2011)).

Each of these factors helps account for the fact that a significant number of those killed by police officers in the United States die while in the midst of a mental health crisis. *The Washington Post* recently undertook to create a "national, real-time tally of the shooting deaths of mentally distraught individuals at the hands of law enforcement." *See generally* Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/. Their analysis found that "the dead account[ed] for a quarter of the 462 people shot to death by police in the first six months of 2015." *Id.* A survey of police-involved deaths in New York City in 1999 determined that one third of those killed were mentally ill. *See* James J. Frye, *Policing the Emotionally Disturbed*, 28 J. AM. ACAD. PSYCHIATRY 345 (2000). A twenty year survey in Seattle from 1980 and 2000 reached the same conclusion. *See* Robert L. Jamieson, Jr. & Kimberly A.C. Wilson, *Mental Illness Frequently Deepens Tragedy of Police Shootings*, SEATTLE POST-INTELLIGENCER, May 25, 2000.

However, the disproportionate use of force against persons with mental illness is not always a result of officer misapprehension or aggressiveness on the part of the mentally ill. As this Court has

recognized, "the symptomatology of a mental or emotional illness" can be "truly 'stigmatizing,' " and "arouse[] . . . negative reaction" and "social ostracism." *Parham v. J.R.*, 442 U.S. 584, 601 (1979) (quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985) (noting that "the mentally ill" experience "prejudice from at least part of the public at large"). There is evidence that these intensely negative perceptions—embodied by the "stereotype of the violent psychotic person"—have become appreciably worse in the age of mass media. *See* Jo C. Phelan et al., *Public Conceptions of Mental Illness in 1950 and 1996*, 41 J. HEALTH & SOC. BEHAV. 188, 202 (2000). Police officers are not immune from such reactions. In a recent example, an investigation by the U.S. Department of Justice discovered that the Baltimore Police Department "routinely uses unreasonable force against people with mental illness or in crisis, even when they have not committed any crimes and when the officers know or should know that the individual has a mental health disability." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALT. CTY. POLICE DEP'T 80 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download.

All of the aforementioned factors can create a dangerous dynamic when police officers encounter persons with mental illness. This is doubly so in close quarters when officers make a surprise entry into a person's home, as occurred in this case. It is critical to the safety of persons with mental illness that officers be held liable for injuries that flow from their failure to announce their presence before

making a forcible home entry. If they are not, they will have little incentive to comply with the expectation of announcement. While the element of surprise may offer some comfort to a police officer, it adds an unnecessary element of danger to the home occupant. *See Hudson v. Michigan*, 547 U.S. 586, 593–96 (2006) (discussing reasons for the announcement rule).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FILED
JAN 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES; DEPUTY CHRISTOPHER CONLEY; AND DEPUTY JENNIFER PEDERSON,
Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; CALIFORNIA STATE ASSOCIATION OF COUNTIES; LEAGUE OF CALIFORNIA CITIES; AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Each of the *amici curiae* has a strong interest in cases, such as this one, that implicate public safety and the liability of local police officers.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners have filed a letter with the Clerk of the Court providing blanket consent to the filing of *amicus curiae* briefs. Respondents' consent has been provided by a letter that *amici* have delivered to the Clerk simultaneously with the filing of this brief.

government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, composed of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities (League) is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, composed of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The National Sheriffs' Association (Association), a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, to protect, and to preserve our nation's Departments/Offices of Sheriff. The Association has over 21,000 members and is a strong advocate for over 3,000 individual sheriffs located throughout the United States. Over 99% of

our Nation's Departments/Offices of Sheriff are directly elected by the people in their local county, city, or parish. The Association promotes the public-interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

SUMMARY OF ARGUMENT

Under the Ninth Circuit's "provocation rule," any time an officer commits an actionable Fourth Amendment violation and violence ensues, the officer will be personally liable in damages for the resulting physical injuries. Pet. App. 6a; *see also* Pet. App. 22a-24a. This rule is legally flawed, the lower courts erred in invoking it here, and it should be expressly rejected by this Court. The Ninth Circuit alternatively purported to justify the same outcome based on an application of proximate causation principles, but that holding is equally wrong.

1. The Ninth Circuit held below that, if a police officer commits an actionable Fourth Amendment violation (such as, here, a search without a warrant), the officer is *automatically* personally liable under 42 U.S.C. § 1983 for any physical injuries that ensue, even if those injuries are the consequence of the officer's *reasonable* use of force to neutralize a perceived threat. Pet. App. 22a-24a.

a. Although the Ninth Circuit has stated that its provocation rule requires that the officer have acted "intentionally or recklessly," *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *see also* Pet. App. 22a, the Ninth Circuit held below that this requirement will be satisfied whenever the officer is "not entitled to qualified immunity." Pet. App. 23a.

Because qualified immunity must be overcome to establish a viable § 1983 claim, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the result is that the "recklessness" requirement is automatically met *whenever* there is an actionable Fourth Amendment violation. Pet. App. 23a.

b. In addition to confirming that the provocation rule does not in fact require recklessness, the Ninth Circuit's opinion in this case also made clear that the rule does not even require "provocation." Rather, all that is required is that the officer's actionable Fourth Amendment violation "'*create[d] a situation which led to the shooting* and required the officer to use force that might otherwise have been reasonable.'" Pet. App. 22a (quoting *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010)) (emphasis added).

2. The resulting *per se* rule—which imposes automatic liability for physical injuries that ensue from an actionable Fourth Amendment violation—is indefensible and should be rejected.

a. The Ninth Circuit's rule cannot be reconciled with the rights-specific focus of § 1983 liability. "'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citation omitted). The "validity of the [§ 1983] claim must then be judged by reference to the specific constitutional standard which governs that right[.]" *Id.* Likewise, "[i]n order to further the purpose of § 1983, the rules governing *compensation* for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

Rather than apply this rights-specific analysis, the Ninth Circuit relied on the provocation rule to adopt an unorthodox mix-and-match approach that (1) grounded *liability* in the infringement of one right (*viz.*, the protection against search without a warrant), but then (2) awarded *damages* for personal injuries just as if the officers had been found liable for infringing two other rights *for which there was no liability* (*viz.*, the right to have officers knock and announce and the protection against excessive force).

b. The Ninth Circuit's provocation rule should also be rejected because it improperly disregards the substantive standards governing excessive force claims, and it weakens the protections of qualified immunity. The decision below squarely conflicts with *Graham* because, despite the complete absence of excessive force under *Graham*'s controlling standards, the lower courts nonetheless employed the provocation doctrine to hold the officers liable *for their use of reasonable force*. Moreover, because the chain of causation linking the warrantless search to the subsequent physical injuries necessarily runs through an action—the failure to knock and announce—for which there is qualified immunity, that intervening qualified immunity should have barred any liability for the Plaintiffs' physical injuries.

c. The Ninth Circuit's provocation doctrine is legally flawed for the additional reason that it disregards the directness requirement of the doctrine of proximate causation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006); *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Under the provocation rule, once an actionable Fourth Amendment violation has occurred, the officers are liable for any reasonable force they may later need to use in

the ensuing "situation" that the officers "created." Pet. App. 22a. Because the *per se* nature of the provocation rule omits any requirement to show that the "alleged violation led *directly* to the plaintiff's injuries," *Anza*, 547 U.S. at 461 (emphasis added), that rule is flatly contrary to proximate causation principles.

d. By imposing liability for the use of *reasonable* force, the provocation rule runs the risk of effectively punishing actions that may be necessary, in a given moment, to save lives. Although one purpose of § 1983 is to deter unconstitutional conduct, once a situation has reached the point where it is reasonable for officers to use force to protect themselves or others, those officers should *not* be deterred from doing so.

3. The Ninth Circuit was equally wrong in its alternative holding that the officers' failure to secure a warrant for the search of the shack proximately caused Plaintiffs' injuries. Pet. App. 24a-25a.

a. Because the exact same injuries would have occurred if the officers had performed the same search the same way *with* a warrant, the absence of a warrant plainly had no meaningful connection to the subsequent physical injuries. The requisite "direct relation" between Plaintiffs' physical injuries and the officers' failure to secure a warrant is simply absent. *Holmes*, 503 U.S. at 268.

b. Mendez's inadvertent actions in pointing a realistic BB rifle at the officers was a superseding cause that broke any chain of causation between the officers' initial failure to obtain a warrant and their subsequent defensive shooting. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008);

Archer v. Warner, 538 U.S. 314, 326 (2003). The Ninth Circuit held that Mendez's actions were foreseeable and that this foreseeability precluded the application of the superseding cause doctrine, but both of these holdings are wrong. It was *not* foreseeable that Mendez would just so happen to use a "BB gun rifle to help him sit up" on the futon. Pet. App. 69a. And the mere fact that violence against police officers is "foreseeable"—as it is in nearly every aspect of their work—is insufficient to defeat the application of the superseding cause doctrine.

ARGUMENT

In its opinion in this case, the Ninth Circuit held that, if a police officer encounters a civilian as a result of an actionable Fourth Amendment violation (such as, here, a search of a structure without a warrant), the officer is *automatically* personally liable under 42 U.S.C. § 1983 for any physical injuries that occur if the civilian displays or applies force against the officer and the officer responds with *reasonable* force. Pet. App. 22a-24a. Alternatively, the Ninth Circuit held that, where it is reasonably foreseeable that an officer's Fourth Amendment violation could be followed by a civilian display of force, that violation will be deemed to be the proximate cause of any injuries resulting from the officer's reasonable responsive force. Pet. App. 24a-25a. Both of these holdings are contrary to well settled law and would have grave implications for the safety of peace officers and the general public. The judgment resting on these holdings should be reversed.

I. The Ninth Circuit's *Per Se* Provocation Rule Conflicts With Settled § 1983 Case Law, Proximate Causation Principles, and Common Sense

Under the Ninth Circuit's *per se* "provocation rule," any time an officer commits an actionable Fourth Amendment violation and violence subsequently ensues, the officer will be personally liable in damages for the resulting physical injuries. Pet. App. 6a; *see also* Pet. App. 22a-24a. This Court has previously recognized that "[t]he Ninth Circuit's 'provocation rule' ... has been sharply questioned elsewhere," *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015), but the Court has not yet had the opportunity to repudiate the rule. It is now time to do so.

A. Under the Provocation Doctrine, an Officer Who Commits an Actionable Fourth Amendment Violation Is Automatically Liable for Any Ensuing Physical Injuries, Including Injuries From Using *Reasonable* Defensive Force

As originally articulated, the Ninth Circuit's provocation rule provided that "where an officer [1] intentionally or recklessly [2] provokes a violent confrontation, [3] if the provocation is an independent Fourth Amendment violation, he may be liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *see also* Pet. App. 22a. That rule would be problematic enough,[2] but as this case shows, the Ninth Circuit

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[2] Even as initially formulated, the Ninth Circuit's provocation rule suffers from many of the same legal flaws discussed below. In particular, even a more narrow reading of the provocation

has effectively eliminated the recklessness and provocation requirements, thereby producing an even more remarkably sweeping—and deeply flawed—categorical rule.

First, the Ninth Circuit held below that the requirement that the officer must have acted "recklessly" will be satisfied whenever the officer is "not entitled to qualified immunity." Pet. App. 23a. Because qualified immunity must be overcome to establish a viable § 1983 claim against an officer, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the result is that the Ninth Circuit's "recklessness" requirement is automatically met *whenever* there is an actionable Fourth Amendment violation. Pet. App. 23a.

Second, the opinion below confirms that, under Ninth Circuit case law, the requirement that the officer "provoke[] a violent confrontation" with a civilian does not actually require either provocation or a violent response by the civilian. Pet. App. 22a-23a. Rather, it is sufficient that the officer's actionable Fourth Amendment violation "'*create[d] a situation which led to the shooting* and required the officer to use force that might otherwise have been reasonable.'" Pet. App. 22a (quoting *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 539 (9th Cir.

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doctrine—*i.e.*, one that requires subjective intent or recklessness and that requires actual provocation—would still improperly depart from this Court's objective test for evaluating excessive force claims under the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386 (1989). And rather than apply this Court's standards for evaluating the "precise constitutional violation" at issue, *see id.* at 394, such a rule would create a novel hybrid tort that is unmoored from the specific standards that govern particular claims for violation of constitutional rights under § 1983.

2010)) (emphasis added). Thus, "the predicate constitutional violations (here, an unlawful search without a warrant) need not be ... 'provocative' in the sense of *inciting* a violent response." Pet. App. 118a (emphasis added). Indeed, as this case illustrates, the Ninth Circuit's provocation doctrine does not require that the officer's actions actually *cause any reaction* by the civilian at all, much less a violent one. The court of appeals specifically held that it was irrelevant that Mendez "was not responding to the deputies' actions" when he moved the BB gun; all that mattered was that Officer Conley's unlawful search "'created the situation that led to the shooting.'" Pet. App. 22a (citation omitted). And because the officers are liable for all physical injuries that ensue from the "situation" they created, *see id.*, it does not matter if the civilian responds with a wildly disproportionate violent response. As the district court explained, it is irrelevant whether the officer acted "in a way that necessarily 'deserved' a violent response." Pet. App. 119a.

Accordingly, as construed by the Ninth Circuit, the so-called "provocation doctrine" establishes a sweeping *per se* rule that imposes personal liability for physical harm *whenever* an officer commits an actionable Fourth Amendment violation that then leads to a situation in which the police end up using *reasonable* defensive force that injures a civilian. This *per se* rule is indefensible and should be rejected.

B. The Ninth Circuit's Provocation Rule Is Contrary to Settled Law and Has Disturbing Practical Implications

The Ninth Circuit's provocation doctrine contravenes settled law concerning the scope of § 1983 lia-

bility, evades the standards governing excessive force claims, eviscerates the protections of qualified immunity, and disregards well-established proximate causation principles. On top of that, the doctrine creates troubling practical incentives that are inconsistent with the safety of police officers and the general public. It should be explicitly rejected.

1. The Provocation Rule Disregards the Rights-Specific Focus of § 1983 Liability

The automatic liability for physical injuries that the provocation rule attaches to *any* actionable Fourth Amendment violation cannot be reconciled with the rights-specific focus of § 1983 liability.

As applicable here, § 1983 provides that an officer who "subjects, or causes to be subjected," any person "to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983. As the text of the statute makes clear, the "injur[y]" that gives rise to a right to compensation is the "deprivation" of a *particular* "right[] ... secured by the Constitution." *Id.* Consequently, "'[t]he first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" *Graham*, 490 U.S. at 394 (quoting *Baker v. McCollan*, 443 U.S. 137, 140 (1979)). Those specific claimed constitutional violations will define both the pertinent substantive standards for determining liability as well as the relevant scope of compensable damages. Thus, once the particular alleged violations are identified, the "validity of the [§ 1983] claim must then be judged by reference to the specific constitutional standard which governs that right[.]" *Id.* The

scope of available damages in a § 1983 action must likewise be tied to the specific violations at issue. "In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected *by the particular right in question.*" *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

As this case well illustrates, the Ninth Circuit's *per se* provocation rule impermissibly departs from § 1983's required focus on "the particular right in question." *Id.* The Plaintiffs alleged three distinct constitutional violations: (1) an improper warrantless search in the opening of the door to the shack; (2) the failure to knock and announce before opening that door; and (3) excessive force in the shooting of Plaintiffs. Pet. App. 6a-7a. Under the proper rights-specific analysis, the Ninth Circuit should have evaluated each of these three claims in light of the "specific constitutional standard which governs that right," *Graham*, 490 U.S. at 394, and if the right was violated and qualified immunity does not apply, then the court should have "tailored" the available damages "to the interests protected by [that] particular right in question," *Carey*, 435 U.S. at 259.

Here, the lower courts' finding of liability ultimately rested only on the first of these three theories, *viz.*, that the officers violated the warrant requirement and that qualified immunity was not available for that violation. Pet. App. 18a, 20a, 25a.[3] But as

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[3] The district court specifically found that the officers had probable cause to believe that the fugitive for whom they were searching (O'Dell) was inside the shack, *see* Pet. App. 93a, and the Ninth Circuit expressly analyzed the case "while assuming the district court's probable cause predicate," Pet. App. 11a n.5.

the district court recognized, a damages calculation that is tailored to the interests protected by the warrant requirement yields, at most, only nominal damages here. *See* Pet. App. 52a-53a, 135a; J.A. 238. Conversely, the Plaintiffs' physical injuries *are* tied to the interests protected by the rights at issue in the knock-and-announce and excessive force claims, *see Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (knock-and-announce requirement protects "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident"); *Graham*, 490 U.S. at 394-95 (protection against unreasonable "seizure[]" protects against use of excessive force), but the Ninth Circuit held that there was no substantive liability under either of these two claims. *See* Pet. App. 20a, 22a.

Accordingly, under the required rights-specific focus, Plaintiffs' effort to recover for physical injuries under § 1983 should have failed. Instead, the Ninth Circuit's *per se* provocation rule improperly allowed the court to employ a mix-and-match approach that stitched together a hybrid § 1983 claim, one that predicated the determination of liability on one set of interests and the determination of damages on a different set of interests. That error alone requires rejection of the provocation rule.

2. The Ninth Circuit's Provocation Rule Dilutes the Standards for Excessive Force Claims and Undermines the Protections of Qualified Immunity

Moreover, as this case demonstrates, the Ninth Circuit's provocation rule disregards the substantive standards governing excessive force claims and also weakens the protections of qualified immunity.

First, the Ninth Circuit's *per se* provocation doctrine improperly authorizes an end run around the substantive standards that govern police use of force. Apart from their reliance upon the provocation rule, the lower courts did *not* find that the officers in this case engaged in any use of excessive force—nor could they have done so on this record. Pet. App. 22a, 108a. Although the courts below held that the officers clearly erred in failing to obtain a warrant before opening the unlocked door of the shack, *see* Pet. App. 18a, 97a, there was nothing about the degree of force that they used at any time in the incident that could be said to have been objectively unreasonable. *Graham*, 490 U.S. at 396-97. Despite the complete absence of excessive force under *Graham*'s controlling standards, the lower courts nonetheless employed the provocation doctrine to hold the officers liable for their use of *reasonable* force. Indeed, confirming its stark departure from *Graham*'s standards, the district court entered judgment on a novel, hybrid § 1983 claim that it styled as one for "excessive force (based on *Alexander/Billington* provocation)." Pet. App. 53a. And, confirming its comparable evasion of the *Graham* standards, the Ninth Circuit upheld this judgment based on the court's application of its *per se* provocation rule to the officers' actionable violation of the warrant requirement. Pet. App. 22a-23a.

The resulting conflict between the Ninth Circuit's provocation rule and *Graham* is clear. Contrary to *Graham*, the Ninth Circuit's rule does not consider the severity of the crime at issue nor the threat to others posed by the plaintiff, nor does it even consider the level of force used by the officer. *See supra* at 9-10. Rather, any use of reasonable force—even to prevent a suspect from killing innocent victims—will effectively be deemed "unreasonable as a matter of

law," *see* Pet. App. 111a, if it occurs after an actionable Fourth Amendment violation. *See, e.g., Glenn v. Washington County*, 673 F.3d 864, 879 (9th Cir. 2011) (applying provocation doctrine to hold officers liable for reasonable use of force in shooting of suspect whom they reasonably feared would stab his parents). But where, as here, the use of force was warranted and reasonable "at the moment" it was applied, *Graham*, 490 U.S. at 396, the resulting deprivation is justified, and "the injury caused by a justified deprivation ... is not properly compensable under § 1983," *Carey*, 435 U.S. at 263.

Second, as this case illustrates, the Ninth Circuit's provocation doctrine undermines the protections of qualified immunity. As the Ninth Circuit itself appeared to recognize, the officers' failure to knock and announce before opening the door of the shack was much more closely causally connected to the ensuing tragedy than was the failure to have obtained a warrant. Pet. App. 25a (stating that violence was the reasonably foreseeable result "when the officers barged into the shack *unannounced*") (emphasis added). However, the Ninth Circuit held that liability could *not* be predicated on the failure to knock and announce because the officers were entitled to qualified immunity on that claim. Pet. App. 20a. Despite the fact that the officers were entitled to qualified immunity for this (comparatively speaking) more-proximate cause, the Ninth Circuit effectively eviscerated that qualified immunity by cobbling together a hybrid § 1983 claim that improperly combined (1) the officers' liability on the more-remote error of having failed to obtain a warrant with (2) the damages that occurred *in the aftermath* of the failure to knock and announce. Because the chain of causation linking these two elements *necessarily runs through*

an action for which there is qualified immunity, that intervening qualified immunity should have barred any liability for the Plaintiffs' physical injuries. The provocation rule's disregard of the protections of qualified immunity provides yet further reason to reject it.

3. The Ninth Circuit's Provocation Rule Contravenes Settled Principles of Proximate Causation

The Ninth Circuit's provocation doctrine is legally flawed for the additional reason that it contravenes the principles of proximate causation that apply in § 1983 actions. *See Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (scope of liability under § 1983 "should be read against the background of tort liability," including principles of proximate causation).

While the doctrine of proximate cause is not readily reduced to a "universal formula," W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 42, p. 279 (5th ed. 1984), at the heart of the concept is "a demand for some *direct relation* between the injury asserted and the injurious conduct alleged," *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992) (emphasis added). "[T]he central question [the Court] must ask is whether the alleged violation led *directly* to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added).

The Ninth Circuit's *per se* provocation rule impermissibly disregards the directness requirement of the doctrine of proximate causation. Although the Ninth Circuit alternatively concluded that proximate causation was satisfied here, *see* Pet. App. 24a-25a, that holding was wrong. *See infra* at 22-27. But more

importantly, the expressly *alternative* nature of that holding confirms that the Ninth Circuit's provocation rule is *not* based upon, and does not incorporate, the limitations imposed by proximate causation. That much is also clear from the Ninth Circuit's articulation of the provocation doctrine in this case. As the court of appeals explained, once an actionable Fourth Amendment violation has occurred, the provocation rule will render the officers liable for any violence that ensues from the "situation" that the officers "created." Pet. App. 22a. That is flatly contrary to proximate causation principles. The fact that a claimed physical injury is at the end of a causal chain in which an actionable Fourth Amendment violation is the first link is *not* enough to establish that the injury is the *direct* consequence of the violation. The provocation rule thus does not apply proximate-causation principles; instead, it simply excises them from the inquiry.

4. The Provocation Rule Creates Significant Practical Concerns That Implicate the Safety of Officers and the Public

In addition to being directly contrary to well-settled law, the Ninth Circuit's unorthodox provocation rule creates significant practical concerns. A few hypotheticals, drawn from the facts of actual cases, help to illustrate the point.

Consider, for example, a variation of the facts presented by this Court's decision in *Groh v. Ramirez*, 540 U.S. 551 (2004). There, the ATF applied for, obtained, and executed a search warrant on a home. As it turned out, the portion of the form on which they should have listed the things to be seized simply

repeated the address of the place to be searched, though the warrant application itself had properly listed those items (a variety of powerful weapons, including grenade launchers and rocket launchers). *Id.* at 554, 557. This Court denied qualified immunity based on the warrant's obvious facial invalidity. *Id.* at 563. Now change the facts of *Groh* by supposing that, upon the officers' execution of the invalid warrant, a person inside the home opened fire with a firearm or even the rocket launcher—not because the agents lacked a valid warrant, but merely because the person despised federal agents. Under the Ninth Circuit's provocation rule, the glitch on the warrant would render the agents automatically liable under § 1983 for any physical injuries *if they decide to return fire*. At that moment, the officer can act to preserve his or her own life only at the price of paying millions in damages for the resulting injuries to their assailant. The provocation rule would thus lead to a perverse your-money-or-your-life decision that has no grounding in § 1983 or in common sense.

One need not rely only on hypotheticals to see the provocation doctrine's mischief in action. In *Glenn*, a young man, Lukus Glenn, showed up drunk at his parents' house at 3:00 a.m. 673 F.3d at 866-67. After arguing over his parents' refusal to let him ride his motorcycle, Glenn began smashing household property. *Id.* His parents tried to get Glenn's friends to intervene, but they were unable to calm him down. *Id.* at 867. Glenn then held a pocket knife to his throat and threatened to kill himself. *Id.* His mother called the police, warning that Glenn was "out of control, busting our windows, and has a knife and is threatening us." *Id.* She told them that Glenn "was threatening to kill everybody" and might "run at the cops with a knife." *Id.* at 873. She explained that he

was almost 6 feet tall and athletic. *Id.* at 867. The police raced to the scene and arrived minutes later. *Id.* They told Glenn to drop the knife, but he did not do so or respond in any way. *Id.* at 868. After several minutes of shouting at him to drop the weapon, the police pelted him with bean bags in an attempt to subdue him. *Id.* at 869. Glenn responded by moving to enter the house. *Id.* The officers then "reasonably feared that he could have attacked his parents with the knife so they shot [Glenn] to protect his family." *Id.* at 879. In the ensuing § 1983 action, the district court granted qualified immunity to the officers but the Ninth Circuit reversed.

The Ninth Circuit in *Glenn* denied qualified immunity as to the use of the beanbags, suggesting among other things that the officers could have tried gentler "persuasion" rather than "shouting" prior to trying to subdue Glenn with the beanbags, and that they could have used a different form of non-lethal force, namely a taser. *Id.* at 872-78. The Ninth Circuit asserted that even if, "as the district court concluded, deadly force was a reasonable response to [Glenn's] movement toward the house, a jury could find that the beanbag shots provoked [Glenn's] movement and thereby precipitated the use of lethal force." *Id.* at 879. "If jurors conclude that the provocation—the use of the beanbag shotgun—was an independent Fourth Amendment violation, the officers 'may be held liable for [their] otherwise defensive use of deadly force.'" *Id.* (quoting *Billington*, 292 F.3d at 1189). And because the Ninth Circuit's provocation rule does not require reckless or intentional provocation, or even "recklessness" in a tort sense, *see supra* at 8-10, so long as there was "an independent Fourth Amendment violation" in the initial use of non-lethal force to stop Glenn, the officers would be

liable for the subsequent reasonable use of lethal force to save innocents.

Under the Ninth Circuit's *per se* provocation rule, once the officers committed an initial actionable Fourth Amendment violation by firing the beanbags, *any* subsequent use of force by the officers to subdue Glenn and prevent him from killing his parents would entitle Glenn to monetary damages for injuries he incurred from that force. Thus, *at the moment Glenn posed a threat to his parents*, the provocation rule would present the officers with an even more disturbing choice between the officers' money and *someone else's* life. An officer who heeded the perverse deterrent effect potentially created by the provocation doctrine would, of course, be derelict in his or her solemn duty to protect the innocent, but an officer who upheld that duty would pay potentially millions in damages for having done so.

A variation on the facts of this case further illustrates the troubling nature of the Ninth Circuit's rule. Had it turned out that *O'Dell* was present in the shack by permission of Ms. Hughes and had *he* opened fire to prevent his arrest, presumably the exact same liability would have followed under the Ninth Circuit's approach. If the officers harmed O'Dell to protect themselves or third parties, they would be liable to O'Dell, even though it would have been O'Dell "who put [a third party] in danger" by his actions. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014). While "it would be perverse if [a criminal's] disregard for [a third party's] safety worked to his benefit" financially, *id.*, the potential for that sort of troubling outcome is inherent in the Ninth Circuit's provocation rule.

As these examples illustrate, the provocation rule runs the risk of creating inappropriate, if not dangerous, practical incentives. To be sure, one purpose and effect of "§ 1983 is to deter state actors" via monetary damages from unconstitutional actions. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). But once a situation has escalated to the point where it is reasonable for the officers to use force to stop a violent act—such as a shooting—police officers should *not* be deterred. As the D.C. Circuit has explained, "police officers could not protect the public if tort law deterred them from approaching and detaining potentially violent suspects." *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007). And this Court has made clear that it is "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they ... put other people's lives in danger." *Scott v. Harris*, 550 U.S. 372, 385 (2007). Once the police confront a situation in which they must act reasonably to use force to protect themselves and others, they should not be deterred from doing so by the threat of § 1983 liability. By contrast, *at the earlier time when an officer makes an error in failing to obtain a warrant*, the then-speculative prospect of a subsequent armed confrontation that could result in automatic personal liability for physical injuries is unlikely to have a significant deterrent effect that would meaningfully add to the more directly applicable deterrents to the unlawful search (namely, the exclusionary rule and liability for the search itself). *Cf. New York v. Harris*, 495 U.S. 14, 20-21 (1990) (where an arrest is made following a warrantless entry, suppression of evidence is sufficient deterrence and suppression of post-arrest statements at stationhouse is unnecessary).

These practical considerations vividly confirm that

the Ninth Circuit's provocation doctrine is a patently erroneous construction of § 1983.

II. The Ninth Circuit's Alternative Proximate Causation Analysis Was Legally Flawed

The Ninth Circuit alternatively held that, "under basic notions of proximate cause," the officers' failure to secure a warrant for the search of the shack rendered them liable for their subsequent *reasonable* use of force. Pet. App. 24a-25a. That holding is equally flawed and equally troubling in its implications.

As noted earlier, to show proximate causation, Plaintiffs had to establish a "direct relation" between their physical injuries and the officers' failure to secure a warrant. *Holmes*, 503 U.S. at 268. Here, for two separate reasons, the requisite direct connection was wholly absent. First, because the exact same injuries would have occurred if the officers had performed the same search the same way *with* a warrant, the absence of a warrant plainly had no meaningful connection to the subsequent physical injuries. Second, Mendez's inadvertent actions in pointing a realistic BB rifle at the officers was a superseding cause that broke any chain of causation between the initial failure to obtain a warrant and the subsequent defensive shooting by the officers.

A. The Officers' Failure to Secure a Warrant Was Too Far Removed From Plaintiffs' Injuries to Be Their Proximate Cause

As explained earlier, the officers' *only* actionable Fourth Amendment violation was their opening of the unlocked door to the dilapidated shack, in which they had probable cause to believe that a dangerous fugi-

tive was hiding, without first securing a warrant. *See supra* at 12-13. But that violation did not proximately cause Plaintiffs' physical injuries because there is not a sufficiently direct causal relationship between the officers' *failure to get a warrant* and the shooting that ensued.

The lack of the requisite causal connection is confirmed by the fact that, if the officers had had a warrant, the opening of the door to the shack would have happened just the same. The district court expressly found that the officers had probable cause, *see* Pet. App. 93a, and so this was not a situation in which the requirement to obtain a warrant would have prevented the search from occurring. Nor did the lack of a warrant contribute in any way to the manner in which the search was carried out; indeed, the Ninth Circuit found no actionable violation in the officers' conduct of the search and instead expressly held that the failure to knock and announce at the shack was protected by qualified immunity. Pet. App. 20a. To satisfy proximate causation, it is not enough that there was a procedural failure at the outset of the search; it is necessary to show that this procedural failure directly caused the shooting. Plaintiffs failed to do so.

Indeed, this case is analytically similar to *Carey*. There, the plaintiffs were suspended without a proper hearing, a violation of their due process rights. The court of appeals held—to the agreement of the parties and this Court—that if the plaintiffs "would have been suspended even if a proper hearing had been held, then [they] will not be entitled to recover damages to compensate them for injuries caused by the suspensions." 435 U.S. at 259-60. So too here: if the opening of the door would have happened just the

same even with proper procedures (*i.e.*, because there was probable cause), then that procedural error cannot justify damages flowing from the door's opening. *Cf. Hudson*, 547 U.S. at 592 (failure to knock and announce in executing warrant did not require suppression of evidence found in search because "[w]hether that preliminary misstep had occurred or *not*, the police would have executed the warrant they had obtained, and would have discovered" the evidence). And there is simply no basis to conclude that the officers would not have searched the shack with a warrant.

To be sure, had the officers obtained a warrant, the factual events might have played out differently in the sense that the officers would have opened the door at a different point in time, and Mendez might not have been moving the BB gun at that particular instant. But that speculation only serves to underscore the lack of any proximate causal connection between the failure to obtain a warrant and the shooting that ensued from the search. Whether or not the officers did or did not have a warrant at the moment they opened the shack door simply had no logical connection to how Mendez responded. Proximate causation looks to an immediate, direct relationship between cause and effect, and there is no such relationship between the lack of a warrant and the shooting.

B. By Inadvertently Pointing a Realistic BB Gun at the Officers, Mendez Broke Any Causal Chain That Began With the Officers' Failure to Obtain a Warrant

The Ninth Circuit's proximate causation analysis fails for the further reason that it is based on a

legally erroneous conception of superseding causation. The court held that, given the number of Americans who own firearms to protect their homes, it was "reasonably foreseeable" that the occupant of the shack would be "holding a gun when the officers barged into the shack unannounced." Pet. App. 25a. Of course, the court's improper reliance on the officers' failure to knock and announce—for which they had qualified immunity—only serves to confirm the lack of proximate causation between the *lack of a warrant* and the subsequent events. But the court's reliance on the asserted foreseeability of an armed confrontation reflects a more fundamental deficiency in the court's proximate causation analysis.

As an initial matter, the court's analysis rests upon the supposed foreseeability of an event *that did not occur*, while ignoring the complete unforeseeability of what *did* occur. Mendez did not believe there was an intruder in his bedroom; he thought it was a friend opening the door as a prank. Pet. App. 68a. Nor did Mendez brandish the gun intending to drive off an intruder; instead, he testified that he was using the gun to help himself sit up. Pet. App. 68a-69a. Indeed, the gun was not a true firearm at all, but a BB gun, albeit a very realistic one. Pet. App. 69a. Thus, the factual scenario that the Ninth Circuit described as foreseeable *did not happen*, and the situation that *did* happen—that Mr. Mendez would use a realistic looking toy gun to help him sit up and greet his friend—was totally unforeseeable.

The Ninth Circuit's legal errors are far more troubling, however, than its factual ones. A plaintiff cannot "establish ... proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury. *See Bridge v. Phoenix Bond &*

Indem. Co., 553 U.S. 639, 658-59 (2008). Thus, the "law is clear that certain intervening events—otherwise called 'superseding causes'—are sufficient to sever the causal nexus and cut off all liability." *Archer v. Warner*, 538 U.S. 314, 326 (2003) (internal citations omitted). A third party's threat to the safety of police officers or others is such a superseding cause. The Ninth Circuit erred in failing to recognize that, when a threat of violence from a third party provokes a reasonable use of force, that threat is a superseding cause that breaks the causal chain for purposes of proximate cause.

The court seemed to think that the mere fact that violence is "foreseeable"—as opposed, say, to expected or intended—is sufficient to defeat the application of the superseding cause doctrine. Pet. App. 25a. But whatever the role of foreseeability in other contexts, it cannot by itself be dispositive here. Police officers are, by the nature of their duties, routinely sent into perlious situations (such as trying to locate dangerous fugitives) and, sadly, violence against peace officers is all too foreseeable in almost any context. If the mere foreseeable prospect of violence against police officers were sufficient to preclude the application of superseding causation doctrine, then officers would seemingly be deemed to have proximately "caused" all of the violence and displays of force that they encounter as a consequence of any mistake they might make. That cannot be correct.

The court of appeals seemed implicitly to recognize that more than foreseeability was required, because it sought to analogize this "unannounced" entry to the sort of "startling entry" that Justice Jackson condemned in his concurring opinion in *McDonald v. United States*, 335 U.S. 451 (1948). *See* Pet. App.

24a-25a. But the analogy is completely false and instead confirms the Ninth Circuit's error. In *McDonald*, an out-of-uniform officer, without "knowledge of a crime sufficient, even in his own opinion, to justify arrest" of McDonald, "forced open the window of [his] landlady's bedroom and climbed in." 335 U.S. at 457. Justice Jackson questioned the wisdom of undertaking what he characterized as the "felony" of "breaking and entering" where: (1) the crime being investigated was nonviolent; (2) there was no need to enter at that time; (3) the officer had no basis to arrest the suspect he was looking for; and (4) the officer did not know whether the suspect was in the bedroom. *Id.* at 457-61. In this case, the officers did not, without probable cause or uniforms, force open a bedroom window and climb in. Rather, in uniform and with an arrest warrant (Pet. App. 57a), with probable cause to believe a fugitive was hiding in the shack (Pet. App. 93a), during the day time (Pet. App. 56a), the officers opened an unlocked door of a dilapidated shack in the backyard of a house, which they believed to be a storage shed (Pet. App. 66a). To say that the officers in such circumstances should be deemed to have *caused* a violent response effectively—and improperly—eliminates the requirement of proximate causation.

CONCLUSION

The Court should reverse the judgment of the courts of appeals insofar as it upholds the district court's judgment against Petitioners.

Respectfully submitted,

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January 24, 2017

FILED
FEB 23 2017

No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,
Petitioners,

v.

ANGEL MENDEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project ("NPAP") is a nonprofit organization that has no parent company and does not issue stock.

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INTEREST OF *AMICUS CURIAE*[1]

NPAP is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

SUMMARY OF ARGUMENT

The central purpose of 42 U.S.C. § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an Official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Petitioners' proposed rule—that the reasonableness of Fourth Amendment seizures be evaluated without regard to any facts but those at the exact moment an officer applies force—flies in the face of this purpose, as well as the Court's longstanding precedent. If adopted, this rule would prevent innocent parties injured or killed by police during a stop or arrest from presenting *any* evidence of the officers' conduct leading up to the

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[1] Counsel for the *amicus* provided counsel of record for Petitioners and Respondents written notice of the intent to file this brief under Supreme Court Rule 37.2(a). The parties have consented and have executed blanket consents, the record of which has been lodged with the Court. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

moment of violence, even if that earlier conduct was a violation of well-established constitutional law.

This Court should reject the Petitioners' reductionist, outcome-oriented approach, and affirm that Section 1983 Fourth Amendment claims are to be evaluated under the totality of the circumstances, using ordinary principles of proximate cause.

ARGUMENT

I. Fourth Amendment Claims Must Be Evaluated Under the Totality of the Circumstances and Using Ordinary Proximate Cause Principles

1. This Court has long held that the determination of whether a police officer's use of force is reasonable under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, 396 (1989) (quotations omitted). The Court has further explained that, because the reasonableness of a seizure "is not capable of precise definition or mechanical application,"

> its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396.

Consequently, the question to be answered in an excessive force case is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure," *id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). That is, "reasonableness depends on not only when a seizure is made, but also how it is carried out." *Garner,* 471 U.S. at 8. The Court has applied these same principles to searches, as well. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (evaluating suppression of evidence obtained following officers' failure to knock and announce; "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure").

More recently, in *Kingsley v. Hendrickson*, the Court ruled that a Section 1983 plaintiff "must show only that the force purposely or knowingly used against him was objectively unreasonable," but need not prove that the officer subjectively believed it to be excessive. It went on to explain how to apply this objective standard consistent with its prior precedent:

> A court (judge or jury) cannot apply this standard mechanically. Rather, objective reasonableness turns on the "facts and circumstances of each particular case."

135 S. Ct. 2466, 2473 (2015) (quoting *Graham* at 396; citing *Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)).

Under both this Court's decades-old and newer authority, then, all of the facts surrounding a police officer's use of force, seen objectively, must be

considered when determining whether that officer acted reasonably.

2. Consistent with this authority, the Courts of Appeals for the First, Third, Seventh, Ninth, Tenth and Eleventh Circuits (and more recently the Sixth Circuit) look to police conduct in the events preceding and logically connected to the use of deadly force.

In the First Circuit, "[t]he rule ... is that once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure.' Thus, police officers' actions for our purposes need not be examined solely at the 'moment of the shooting.' This rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'" *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (internal citations omitted)).

Similarly, the Third Circuit's view is that "where an officer's conduct amounted to more than a minor departure from internal department policy, and in particular where the officer engaged in intentional misconduct, . . . the officer's acts creating the need for force are important in evaluating the reasonableness of the officer's eventual use of force." *Abraham v. Raso*, 183 F.3d 279, 295 (3d Cir. 1999). The *Abraham* court ruled that "[a]ll of the events transpiring during the officers' pursuit of [plaintiff] can be considered in evaluating the reasonableness of [the officer's] shooting [of plaintiff]," and rejected cases excluding consideration of pre-seizure conduct:

> [W]e do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Abraham at 291.

The Fourth Circuit, analyzing a defendant officer's argument that his acts of force should be viewed in segments, separating the victim's resistance "from the rest of the story," observed:

> This approach seems to us to miss the forest for the trees. The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness.

Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994). *See also Smith v. Ray*, 781 F.3d 95, 103 (4th Cir. Va. 2015) (rejecting a "segmented approach" where officer reacted with disproportionate violence toward female plaintiff and "created the very real possibility that ... [his] attack would continue to meet with frightened resistance, leading to an event further escalation of the violence").

The law of the Seventh Circuit is to the same effect. The assessment of the reasonableness of a police shooting is not "limited to the precise moment when

[the officer] discharged his weapon." *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999). Rather, a court must assess "all of the events that occurred around the time of the shooting." *Id.* at 652. The actions of the police officer that led to the shooting are thus relevant, and an officer who shoots a suspect in an effort to protect himself cannot escape liability if the danger he faced was created by his own unreasonable conduct. *Estate of Starks v. Enyart*, 5 F.3d 230, 233-34 (7th Cir. 1993). *Accord Catlin v. City of Wheaton*, 574 F.3d 361, 369 n.7 (7th Cir. 2009); *Sledd v. Lindsay*, 102 F.3d 282, 287-88 (7th Cir. 1996).

The Ninth Circuit has long held that an officer's own acts in creating a dangerous situation are factors to be considered in the reasonableness analysis. *See, e.g., Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1364-1367 (9th Cir. 1994) (whether it "was unreasonable for the officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered" was a factor in determining whether their subsequent use of deadly force was actionable); *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."); *see also Glenn v. Washington County*, 673 F.3d 864, 879 (9th Cir. 2011); *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 548 (9th Cir. 2010).

The Tenth Circuit has also emphasized that events preceding the seizure are relevant to the reasonableness analysis. In *Sevier v. City of Lawrence*,

60 F.3d 695 (10th Cir. 1995), the court held that "[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Id.* at 699 (citing *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994)); *see also Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (holding that officer is liable for excessive force if his or her own "reckless or deliberate conduct during the seizure unreasonably created the need to use such force"); *Romero v. Board of County Comm'rs*, 60 F.3d 702, 704-05 (10th Cir. 1995).

In similar fashion, the Eleventh Circuit, in *Gilmere v. Atlanta*, concluded that an officer's "moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power," and thus upheld the lower court's finding that while an officer's fear of bodily injury was subjectively reasonable, such belief was "objectively unreasonable and could not justify the killing" where "any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse." 774 F.2d 1495, 1501 (11th Cir. 1985).

The reasoning of these decisions finds a solid foundation in *Graham*.

3. This Court has long applied ordinary tort principles, including the requirement of proximate cause, to excessive force actions. It has explained that Section 1983 creates a "species of tort liability" and "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of

them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Accordingly, where proximate cause is lacking, it has rejected liability. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (remanding for determination of reasonableness of roadblock; "if Brower had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it, then, because of lack of proximate causality, respondents, though responsible for depriving him of his freedom of movement, would not be liable for his death"); *see also Martinez v. State of Cal.*, 444 U.S. 277, 285 (1980) (affirming judgment dismissing wrongful death case based on release of parolee who later murdered a teenage girl; "appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law").

When reaching this determination in *Brower*, consistent with its "totality of the circumstances" precedent, the Court looked to the officers' pre-seizure conduct. It considered not just the moment the decedent struck the roadblock, but also plaintiffs' allegations that the officers "set[] up the roadblock in such manner as to be likely to kill him" by placing an 18-wheel tractor-trailer across both lanes of a two-lane highway in the path of Brower's flight, concealing it behind a curve and leaving it unilluminated, and positioning a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be "blinded" on his approach. 489 U.S. at 594, 598.

Several circuits have also addressed the Fourth Amendment's objective reasonableness test in excessive

force cases as an application of common law principles of proximate causation. The Sixth Circuit, for example, has held that even when intervening factors of third parties are at play, "the requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause" the deprivation of plaintiff's constitutional rights. *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006) (quoting *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988)). *See also Abraham*, 183 F.3d at 292 ("We are not saying, of course, that all preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation..."). Similarly, the Ninth Circuit's so-called "provocation doctrine" is, at its core, just one part of a proximate cause analysis, asking whether the harm suffered by a plaintiff is the foreseeable result of an officer's initial unconstitutional conduct that led to the defendant's ultimate use of force. *See Billington*, 292 F.3d at 1189-90. This is not to say that *every* unlawful or reckless act of a police officer that starts a chain of events resulting in a police shooting will lead to liability; rather, as in tort law, but-for causation is reined in to a significant degree by the proximate cause concepts of foreseeability and superseding cause. *See generally Bodine v. Warwick*, 72 F.3d 393, 400 (3rd Cir. 1995).

II. Petitioners' Proposed Rule Fails to Consider the Totality of the Circumstances, and Abandons Ordinary Proximate Cause Principles

1. Petitioners seek an interpretation of *Graham* under which liability for any use of excessive force turns on its objective reasonableness "evaluated as of 'the moment' the force was used," without allowing the factfinder to examine *any* events preceding that decision to use force. This position finds no support in the Court's jurisprudence, which has never foreclosed the consideration of relevant context prior to the split-second decision-making process of an officer who opts, reasonably or unreasonably, to use force in effecting a seizure.[2] And it flies in the face of *Graham*'s exhortation to pay "careful attention to the facts and circumstances of each particular case" and to evaluate the "totality of the circumstances" that may justify, or not, a particular Fourth Amendment seizure. In evaluating the totality of facts to determine the reasonableness of force, the decisions of this Court and the Courts of Appeals described above properly include an assessment of the police officer's own actions, and

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[2] It does not even find support in all of its own *amici*. Although the government filed an *amicus* brief in support of Petitioners, it concedes that officer conduct before the moment force is applied may be relevant. *See* Br. for the United States at 26 (acknowledging "the relevance of some earlier events, including in some cases the actions of police, in analyzing the reasonableness of the use of force"). *See also* Br. of Major County Sheriffs at 5 (arguing that it is always reasonable for an officer to respond to a threatened shooting, "[s]hort of some grotesque encounter where law enforcement stages a violent encounter").

weigh in the balance unreasonable conduct that foreseeably leads to the use of force.

2. Petitioners' proposed rule also strips from the factfinder the ability to even engage in a proximate cause analysis when excessive force is alleged. Petitioners ask this Court to adopt the absolute rule that "when an individual points a gun at a law enforcement officer, that is a superseding event that breaks the chain of causation from prior unlawful conduct." Pet. Br. 19. This is precisely the type of mechanist approach that violates *Graham*'s requirement to allow the fact-finder to analyze the "totality of the circumstances," 490 U.S. at 396, and impinges on the Seventh Amendment jury trial right, *see Abraham*, 183 F.3d at 290 ("reasonableness under the Fourth Amendment should frequently remain a question for the jury"); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("reasonableness traditionally is a question of fact for the jury").

Without doubt, a plaintiff's own intentional, negligent, or reckless actions can intervene and, in some cases, cut off the liability of a defendant for injuries suffered due to the defendant's actions. Perhaps the most frequently cited example of this is the hypothetical posed by the Third Circuit in *Bodine*:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of

> the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."

The *Bodine* analysis is proper, and takes into account an important aspect of the law of superseding causation that is missing from the Petitioners' proposed rule: the culpability of the victim.

This is important, because not every intervening force will operate as a superseding cause to break the chain of proximate causation.[3] If the intervening force is not within the scope of risk caused by defendant's earlier actions, or if the party causing the intervening force is himself somehow culpable in his acts (intentionally, criminally, or recklessly), then that intervening action will be considered a superseding cause. *See* Restatement § 442. On the other hand, if the intervening actions are foreseeable, then they "are within the scope of the original risk, and...will not supercede the defendant's responsibility." W. Page Keeton et al., Prosser and Keeton on Torts § 44, at 303-04 (5th ed. 1984).

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[3] An "intervening force" is "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement (Second) of Torts § 441 ("Restatement"). "Superseding cause" refers to only those intervening acts which "prevent[] the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement § 440.

Where, as in the present case, the intervening force is purely innocent conduct on the part of the victim, courts should be particularly skeptical of a claim that such innocent conduct is in fact a "superseding cause" that breaks the chain of proximate causation.

> Where the...conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Restatement § 442B. It is hard to see how, under common law tort principles, an innocent victim's act of moving a BB gun from one part of his bed to another, when he was wholly unaware of a police intrusion into his home, can be a "superseding cause" of the victim being shot by police. He did nothing wrong. His acts were not criminal or reckless; they were not even negligent.[4]

In the end, whether or not the actions of a victim of police force such as Mr. Mendez constitute a superseding cause is a question that must be resolved

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[4] The same could be said even if Mr. Mendez had been handling a real gun, and pointed it at the doorway as two apparent intruders entered unannounced. *See District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (finding unconstitutional a law "that firearms in the home be rendered and kept inoperable at all times" because it "makes it impossible for citizens to use them for the core lawful purpose of self-defense").

by the trier of fact. "The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co. USA v. Sofec Inc.*, 517 U.S. 830, 840-41 (1996). Thus, even where a plaintiff's acts do constitute an intervening cause of the harm (such as by handling a rifle at the time of police entry), whether or not this rises to the level of a *superseding* cause sufficient to relieve the defendant of all liability is an issue best reserved for the jury after being instructed on the law and evaluating the totality of the circumstances.

3. The policy rationales advanced by Petitioners and their *amici* cannot rescue their proposed rule.

Law enforcement *amici* contend that officer safety will be threatened if the decision below is upheld, because it forces officers to "look backwards" rather than "remain mentally present" during a potentially violent confrontation, and "think back on every tactical decision *leading up to* that moment" rather than "focusing her attention on...the situation," Br. of Los Angeles County Police Chiefs' Association at 2, 7-8 (emphasis in original). *See also* Br. of California State Sheriffs' Association, California Police Chiefs' Association and California Peace Officers' Association at 18 (officers will "second guess" themselves, leading to "hesitation" and "tragic, life-ending results...").

This is a straw man. The "totality of the circumstances" test does not ask officers to consider, in the moments before firing, whether they have committed an earlier constitutional violation. *Cf.* Br. of Major County Sheriffs at 12. It does not ask that they put their lives at risk, or stand down when

confronted with deadly force. It asks them instead to adhere to the constitutional limitations on their authority (such as by not searching homes without warrants), and avoid taking actions that foreseeably start or escalate a violent confrontation (such as entering a room silently with guns drawn). It also provides compensation to citizens who are maimed or killed when the officers violate clearly established law and cause harm.[5]

Considering whether an officer foreseeably created the violent situation in which he finds himself is also more consistent with the trend towards de-escalation in modern law enforcement, which these same *amici* cite with approval as a way to "deliver policing services in a way that reduces the number of police-involved shootings and use of force incidents and increases public trust" (Br. of Los Angeles County Police Chiefs' Association at 4), and which the United States Department of Justice has promoted through consent decrees. *See* Resp. Br. 2 n.2. *See also* Police Chiefs at 5 (officer training "[s]cenarios should go beyond the traditional 'shoot-don't shoot' decision-making, and instead provide for a variety of possible outcomes, including some in which communication, de-escalation, and use of less-lethal options are most appropriate").

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[5] As Respondents point out, this compensation is universally paid by the cities and counties that employ, train, and supervise the officers, not the officers themselves. Resp. Br. 16 n.10.

III. The Petitioners' Proposed Rule Would Result in Substantial Injustice for Victims of Police Violence

1. Petitioners' proposed rule would result in substantial injustice for victims of police violence. If the "segmented moment" test were followed, innocent parties (or their estates) who are foreseeably injured or killed after officers create or escalate a dangerous situation would have no recourse. As the following examples drawn from NPAP members' practices show, this is a real-world concern.

a. Montana Police investigating a vehicle theft and burglary spotted a vehicle which they had a "hunch" might have been involved in a crime. They followed the vehicle without lights or sirens on a snow-covered road into the hills. When the police SUV became stuck in the snow, the officers learned from local teens that the "suspect" was traveling down a dead end road and would have to return past the officers' location. Rather than activate their lights or sirens to indicate a road block, the officers moved their vehicle into the center of the roadway and armed themselves with shotguns and assault rifles "to be ready" when the car returned. When it did, the officers positioned themselves in the roadway with their guns aimed at the oncoming vehicle. Video shows that as the vehicle came into view of the deputies, it appeared to slow down and veer left, away from them. Nonetheless, they approached and fired their weapons. When the vehicle spun out of control, the officers continued to fire, emptying their magazines and barely avoiding shooting each other. One of the shots entered the back of the driver, Loren

Simpson's neck, severed his brain stem, and killed him.[6]

b. Hatalio Serrano, father of 5 children, was experiencing a mental disturbance, and so his family called the police to check on him. Although no crime had been committed, the police officers who responded ordered Mr. Serrano to the ground. He complied, going to his knees and placing his hands behind his head. Nonetheless, the officers attempted to force him down on the ground, employing tasers collectively 7 times for 42 seconds. He fell to the ground, rolled to his back and cried out in pain. Three officers tried to roll him over and handcuff him from behind while he struggled, yelling to the officers to stop that he could not breathe. Onlookers, including the immediate family, also yelled at the officers to stop. After 3 more minutes of struggle, during which the officers applied bodily weight on Mr. Serrano and pinned his arms behind his back, they finally succeeded in handcuffing him. When they rolled him over, he was no longer breathing. He died of positional asphyxia. No crime had been committed and Mr. Serrano presented no danger to himself, the officers, or others.[7]

c. Responding to a 911 call from the mother of a 16-year-old schizophrenic who seemed to be experiencing a nervous breakdown, officers rushed the apartment without non-lethal weapons, leaving a taser and a bean bag shotgun in the trunk. The teen, who was alone in the apartment, told the officers that he did not wish to

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[6] *Simpson v. Yellowstone Co.*, No. 15-99 (D. Mont.)

[7] *Serrano v. Colton*, No. 13-0519 (C.D. Cal.)

talk to them and attempted to slam the door in their face. One officer stuck his foot in the door and kicked it open. The three officers entered the apartment without a warrant and without exigent circumstances. When they saw that the young man was in the kitchen holding knives, they shot him 10 times. He lived, but suffered extensive and permanent injuries.[8]

d. Bill Scozzari was elderly, disabled, blind in one eye, and hard of hearing. While walking in the woods near his home, he encountered the chief of police, who was investigating possible shots fired. The chief, despite having no legal authority to stop Mr. Scozzari, attempted to engage him. Having no reasonable suspicion that Mr. Scozzari had or was about to engage in any criminal activity, the chief allowed him to return to his cabin, where he entered and closed his door. The chief then requested back up, who arrived and decided to arrest Mr. Scozzari, who the chief claimed had raised his cane in a threatening manner and exposed a knife on his belt during their earlier encounter. They obtained no warrant. The backup officer knocked on the door with his taser drawn and ordered Mr. Scozzari out of his home in order to submit to arrest. Mr. Scozzari opened the door, but declined to leave the home and started to shut the door when the backup deployed his taser. The officer then kicked the door, in response to which Mr. Scozzari opened it again and was met with a barrage of gunfire. He died. The officers' claim that the decedent was armed with a hatchet or knife was disputed by several witnesses.[9]

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[8] *Palacios v. Park Forest*, No. 14-04661 (N.D. Ill.)

[9] *Scozzari v. City of Clare*, No. 08-10997 (E.D. Mich.)

In these and numerous other cases, unconstitutional police conduct results in the use of needless and fatal force. The rule proposed by the Petitioners would immunize that conduct, always resulting in a finding of no liability when officers respond to an apparent threat to their safety—even in the presence of the most blatantly illegal antecedent conduct which foreseeably resulted in the "need" to use force. Carried to its logical conclusion, the Petitioners' position would even give cover to those who knowingly violate the law or act out of malice, by signaling that no matter how egregious officer conduct, the use of force is justifiable so long as, in the final "segment," the victim behaves in a way that can be interpreted as a threat. That has never been, and should not be, the law of this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Ninth Circuit, and reaffirm the principle that Fourth Amendment seizure cases, including those alleging excessive force, must be adjudicated based on an objective reasonableness standard; that such adjudication requires not only a finding of constitutional violation, but also proximate causation of the plaintiff's injury; and that evaluating the chain of causation is a fact-specific inquiry involving the totality of circumstances. Application of mechanical rules that operate to shield the police from liability as a matter of law whenever they engage in perceived self-defense is flatly inconsistent with this Court's precedent, and constitutes an invitation to abuse.

Respectfully submitted,

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FILED
FEB 23 2017

No. 16-369

In the

Supreme Court of the United States

COUNTY OF LOS ANGELES, CHRISTOPHER CONLEY AND JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

As part of its mission, The Rutherford Institute resists the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that according ever increasing power and authority to law enforcement only creates a false sense of security while sacrificing unconscionable intrusions upon the private lives of private citizens.

The Rutherford Institute is interested in this case because it is committed to ensuring the continued vitality of the Fourth Amendment. Reversal of the Ninth Circuit's decision would be tantamount to holding that law enforcement officials are entirely immune from their own culpable conduct, even in circumstances when the victims of that conduct are acknowledged by all to be without fault.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. A letter from Petitioners consenting to the filing of this amicus brief has been filed with the Clerk of the Court. Attached is consent from Respondents.

ARGUMENT

I. Law Enforcement Officers May Be Held Liable Under Traditional Proximate Cause Standards

On the morning of October 1, 2010, the Mendezes were confronted in their own home by two sheriff's deputies of the Los Angeles County Police Department. But the Mendezes had done no wrong; the policemen had targeted the wrong people. As Mr. Mendez moved a toy gun he uses to shoot pests, the sheriffs fired 15 shots, shattering Mr. Mendez's leg and striking his pregnant wife in the back.

That the traditional tort law standard of proximate cause applies to 42 U.S.C. § 1983 claims is, by now, hardly controversial. This Court has explained quite simply that a § 1983 plaintiff pursues "a species of tort liability." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *accord*, e.g., *Carey v. Piphus*, 435 U.S. 247, 258 (1978); *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986). Both Petitioners and Respondents agree on this much.

The Petitioners' focus on the Ninth Circuit's application of its "provocation rule." But the Court also explained that "even without relying on . . . [the] provocation theory, the deputies are liable for the shooting under *basic notions of proximate cause*." *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1194 (9th Cir. 2016) (emphasis added).

"Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, p. 493 (2005)). Under that standard, law enforcement officials are free from liability only "in sit-

uations where the causal link between [their] conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.* at 1719 (2014).

As Respondents argue, it is hardly unforeseeable that a person might react violently when an unknown and unidentified person barges into his home without saying who he or she is. This Court's decision in *District of Columbia v. Heller* specifically contemplates "handgun possession in the home . . . for the lawful purpose of self-defense" and emphasized "the importance of the lawful defense of self, family, and property" in the home. 554 U.S. 570, 573 (2008). Decades ago, Justice Jackson explained similarly:

> When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot . . . . But an officer seeing a gun being drawn on him might shoot first.

McDonald v. United States, 335 U.S. 451, 460–61, 69 (1948) (Jackson, J., concurring). Accordingly, it is common sense that if a police officer enters into the home of a private citizen unannounced, violence may ensue.

In claiming that the circumstances that led to the shooting of the Mendezes were not foreseeable, Petitioners repeat that the Mendez tragedy was a "tragic happenstance." Pet'r's Br. 2, 56. It was certainly a tragedy. But it was a foreseeable tragedy.

II. The Mendez tragedy was a foreseeable consequence of avoidable police practices.

These types of situations have occurred before, which belies Petitioners' claim that the sequence of events that led to the Mendezes being shot is unforeseeable.

In 2006, Kathryn Johnston, an elderly Georgia woman who lived in a dangerous neighborhood, assumed her home was under attack by armed invaders when three law enforcement officials entered her home without identifying themselves as police officers. In an attempt to defend herself she fired a shot into the ceiling. Johnson, an octogenarian, ended up being shot and killed by the officers.[2]

In 2008, Tracy Ingle, a 40-year-old former stonemason assumed he too was under attack when he heard the sound of a battering ram at his door. He pulled out a non-working handgun in an attempt to scare of the would-be intruders. By the time he realized the intruders were actually police officers attempting to execute a search warrant, it was too late. Ingle was shot above his knee shattering his thigh.[3]

Petitioners further claim that Mr. Mendez's act of holding a BB gun as the deputies entered his home was a superseding act that broke the causal chain. Not so.

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[2] Patrick Jonsson, *After Atlanta Raid Tragedy*, New Scrutiny of Police Tactics, Christian Science Monitor (Nov. 29, 2006), http://www.csmonitor.com/2006/1129/p03s03-usec.html

[3] David Koon, *Shot In The Dark*, Arkansas Times (April 24, 2008), http://www.arktimes.com/arkansas/shot-in-the-dark/Content?oid=948430

In *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995) (Alito, J.), the court illustrated the type of factual circumstances that would justify such a conclusion that the citizen's conduct was a superseding cause:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no." The suspect's conduct would constitute a "superseding" cause

Id. at 400 (citations omitted). This factual scenario is of course predicated on the suspect *knowing* that he was confronting the authorities acting, whether appropriately or not, in their capacity of authorities. In the absence of facts like these, a private citizen's act of defending him or herself can hardly be said to be a superseding cause.

Petitioners add that the Mendezes injuries were not in the "scope of risk" that the Fourth Amendment's proscription against illegal search and seizure

protects. They suggest that the officers may be held liable for the injuries the Mendezes suffered for the unlawful search and seizure of their home, but not the injuries they suffered as a result of the unreasonable use of force. But this Court has already cautioned that common law proximate cause standards are not to be so rigidly applied that they undermine the very purpose of § 1983 . *See Carey v. Piphus*, 435 U.S. 247, 258 (1978) (expressing skepticism "that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case" and explaining that "the purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action"). When law enforcement officials invade a person's home prompting a violent reaction in self-defense, they should not be able to rest on the fact that they are required to make split-second decisions in violent encounters. They cannot claim the benefit of a reasonable misperception while denying it to others.

This case is not about the undeniably difficult decisions law enforcement officials must make during unpredictable encounters with potentially dangerous individuals. This case is about what the officers can reasonably expect if they barge into a private home unannounced.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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